ABLI Legal Convergence Series

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA

ASIAN BUSINESS LAW INSTITUTE

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Project Lead and Editor
Associate Professor Adeline Chong

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About the Asian Business Law Institute

The Asian Business Law Institute ("ABLI") is an Institute based in Singapore that initiates, conducts and facilitates research and produces authoritative texts with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws.

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FOREWORD

The present work is of the first importance and embodies content of the first rank. It is also an excellent achievement given the inherent difficulties that inevitably accompany such an ambitious project. Let me elaborate briefly on each of these points.

First, this work is of the first importance because, even in the domestic sphere, the enforcement of a judgment that has been obtained by a plaintiff is of crucial (if not the most crucial) significance to him or her because this represents the endpoint as well as the hard-won fruit of litigation. When that judgment is a foreign one, there are additional steps that must be taken. The foreign judgment itself must be recognised by the court in which that judgment is sought to be enforced before the plaintiff can invoke the necessary steps or procedures in order that it be enforced. However, the procedures concerned will differ from jurisdiction to jurisdiction. Indeed, unless a true hybrid system exists, the various jurisdictions are themselves often divided into common law jurisdictions and civil law jurisdictions, respectively. And, there often exist differences even within each (common law or civil law) jurisdiction. Under these multifarious and multifactorial circumstances, there can be much confusion (and even frustration) without the requisite knowledge. Hence, the signal importance of the present work. Indeed, given the increased (and increasing) globalisation and internationalisation (and, consequently, the increased (as well as increasing) frequency with which foreign judgments will need to be recognised and enforced), this work takes on more importance than ever before. This brings me to the second point.

Secondly, an even cursory look at the various chapters demonstrates a quality that will ensure that the central aim of this project (as described briefly in the preceding paragraph) will certainly be achieved. Each country report is simple, albeit not simplistic. This is not surprising as each author possesses considerable expertise in the law relating to the recognition as well as enforcement of foreign judgments in his or her own jurisdiction. Indeed, only an expert could have distilled the relevant material in such a skilful manner. Each country report is easily accessible to the reader and (more importantly) enables him or her to gain not only an overview of how foreign judgments are recognised and enforced in

that jurisdiction but also how one might implement the necessary steps in a practical way. I learnt much myself from reading the various country reports. I was also deeply impressed by the breadth of this work. It is not merely focused on the countries from the Association of South East Asian Nations (or "ASEAN" for short). Neither is it merely focused on South Asia or East Asia or Indo-China. *All* these jurisdictions are covered. This work is a considerable *tour de force* indeed. It possesses a richness in flavour that is a true representation of the diversity of each jurisdiction and which represents in many ways the broader goals as well as mission of the Asian Business Law Institute.

Thirdly, as I have already alluded to above, the implementation of such a project is actually a very difficult one. Given the importance of comparative law in light of the increased (and increasing) globalisation and industrialisation also alluded to above, it is no surprise that Singapore law schools presently include comparative law as an integral part of the law curriculum for their respective students. However, the *practice* of comparative law in an important area such as the recognition and enforcement of foreign judgments is another matter altogether. Much co-ordination as well as substantive editing are required. To this end, the leader of the project, Associate Professor Adeline Chong of the School of Law, Singapore Management University, is to be very warmly congratulated for having helped to produce such an excellent work. Her sourcing of the appropriate reporters and her prodigious efforts in co-ordinating their respective efforts (in part *via* carefully crafted chapter headings as well as constant contact with them) as well as her skilful editing of all the chapters deserve the highest praise. I would also like to express my deepest gratitude to all the reporters for availing us of their considerable expertise, as well as to Mark Fisher and Sarah Archer who so ably assisted Professor Chong in this project. Indeed, as a result of all their efforts, the present work is greater than the sum of all its parts.

What is even more exciting is that this work sets the stage for *the next step in a larger project*. This larger project entails a consideration of whether there can be *a convergence or harmonisation* of these seemingly disparate systems of the recognition and enforcement of foreign judgments and, if so, how this is to be accomplished (for example, by way of a set of principles with accompanying commentary in the tradition of that great treatise, *Dicey, Morris & Collins on the Conflict of Laws*, or

perhaps of a model law, or a best practices guide containing model clauses that could be incorporated into bilateral and/or multilateral agreements or a core text). This is an enormously interesting and exciting venture; in a great many ways, the journey has only just begun.

Andrew Phang Boon Leong
Judge of Appeal
Supreme Court of Singapore
1 September 2017

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INTRODUCTION

Project Lead and Editor: **Dr Adeline Chong**
Associate Professor, Singapore Management University

1 The drive to harmonise the recognition and enforcement of foreign judgment rules has gained momentum in recent years. First, there is the revival of the Judgments Project by the Hague Conference on Private International Law. The Judgments Project aims to develop a broad ranging convention on the recognition and enforcement of judgments in civil and commercial matters.[1] Secondly, the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA"), which was concluded in 2005, came into force on 1 October 2015. The HCCCA was born out of work done at earlier negotiations on the Judgments Project. When negotiations stalled, it was decided that work on choice of court agreements in a business to business context should be prioritised. One of the key principles of the HCCCA is that a judgment rendered by a chosen court would be recognised and enforced in the other Contracting States to the HCCCA. It is to date part of the law in 29 countries,[2] with a further four countries[3] having signed, but not ratified, the Convention. Thirdly, there are also efforts which are focused specifically on the Asian region such as the Asian Principles of Private International Law. This is an endeavour by a group of private international law scholars in ten jurisdictions to come up with model laws on various aspects of private international law, including the recognition and enforcement of foreign judgments.[4]

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1 Information on the Judgments Project can be found at https://www.hcch.net/en/projects/legislative-projects/judgments (accessed 9 October 2017).

2 The European Union Member States (excluding Denmark), Mexico and Singapore.

3 China, Montenegro, the US and Ukraine.

4 Weizuo Chen & Gerald Goldstein, "The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law" (2017) 13 *Journal of Private International Law* 411.

2 The need for harmonisation of the foreign judgment rules is particularly acute in Asia as the region moves towards closer economic integration and increasing cross-border trade. The ASEAN Economic Community ("AEC") was established in 2015 with the aim of creating a highly integrated and cohesive ASEAN economy.[5] China's One Belt One Road initiative ("OBOR") seeks to rejuvenate the land and sea trade routes that linked China to the rest of Asia, Africa and Europe in the past.[6] These two initiatives involve countries which collectively represent a significant percentage of the global market and global population. The AEC and OBOR would lead to an increase in the number and size of cross-border transactions, not just within Asia, but also with neighbouring countries and major trade partners. This would, in turn, naturally lead to a rise in cross-border litigation and instances where the judgment debtor's assets may be located in a jurisdiction other than the jurisdiction in which litigation took place. Harmonisation of the foreign judgment rules in Asia thus appears to be no mere idealistic undertaking but is essential to support Asia's ambitious economic plans.

3 It was against this backdrop that the project was conceived. Apart from purely economic advantages, harmonisation would add clarity to the law. The precise rules in some countries are difficult to lay down, as there may have been little legislative or judicial consideration of this area of law. Further, a diversity of rules may be confusing for litigants, who would potentially have to navigate both substantial and subtle differences in the various laws. Harmonisation would obviously increase legal certainty and increase the portability of judgments in the region.

4 Given the clear benefits of harmonisation, the overall objective of the project is to determine whether it is possible to harmonise the law on the recognition and enforcement of foreign judgments in Asia, and if this can be answered in the affirmative, the best means by which harmonisation may be achieved. The project covers the ASEAN

5 Further information on the ASEAN Economic Community can be found at http://asean.org/asean-economic-community/ (accessed 9 October 2017).

6 Further information on the One Belt One Road Initiative can be found at http://china-trade-research.hktdc.com/business-news/article/The-Belt-and-Road-Initiative/The-Belt-and-Road-Initiative/obor/en/1/1X3CGF6L/1X0A36B7.htm (accessed 9 October 2017).

Member States, Australia, China, India, Japan and South Korea. It is to be conducted over two phases. The first phase is a mapping exercise to identify the existing rules in the countries within the scope of the project. This compendium of country reports is the output of the first phase of the project.

5 The country reports consider the recognition and enforcement of foreign judgment rules in civil and commercial matters. The country reports do not deal with foreign judgment rules on family law matters, although some reporters have referred to private international law cases on family law where these cases establish a point of general principle. The rules relating to *in personam* and *in rem* judgments, as well as monetary and non-monetary judgments, are all covered.

6 While detailed analysis of the areas of commonality and differences between the laws of the various countries will be left to the second phase of the project, it is possible to offer some preliminary, and general, observations at this juncture.

7 The countries within the scope of this project are a mix of common law countries, civil law countries and hybrid systems. The common law countries all largely adhere to the English common law framework on foreign judgments. Some differences still exist, for example, on whether default judgments are final and conclusive in nature, and on the scope of the defence of fraud. Nevertheless, save for a handful of issues, it is fair to say that there are no significant differences when one compares the rules of each common law country which is covered in this project.

8 The civil law countries demonstrate a much greater disparity in their laws. For example, the issue of jurisdictional competence of the foreign court is variously tested with reference to the law of the foreign court itself or to the law of the forum. Further, at one end of the spectrum, there are countries which do not appear to recognise and enforce foreign judgments at all. Others would only recognise and enforce a foreign judgment if there is a treaty on that issue between the country which is asked to enforce the judgment and the country from which the judgment stems. As an alternative to a treaty relationship, the remaining civil law countries either require it to be shown that at least one of its judgments has been enforced by the other country in the past,

or, that it is likely that its judgment would be enforced by the other country if the latter is called on to do so.

9 The preceding paragraph alludes to the requirement of reciprocity, which is a prerequisite to enforcement under the civil law systems. This requirement may be thought to be one of the biggest stumbling blocks to harmonisation between the common law and civil law systems. However, it is possible to discern a gradual loosening of how reciprocity is understood and implemented in some of the civil law countries. In fact, it has been argued that reciprocity is due to "become a paper tiger with trimmed claws".[7] Further, while reciprocity is not a requirement under the common law rules, the common law countries in this study either have dedicated statutes or provisions in a general code on civil procedure which deal with the enforcement of foreign judgments from "reciprocating" countries or territories. Designation as a "reciprocating" country or territory is determined by the relevant governments.[8]

10 This brings me to the next point. When one compares the framework of the law in the common law and civil law countries, shared criteria for the recognition and enforcement of a foreign judgment can be identified. The requirement of reciprocity, on one view, is not unique to the civil law countries. The requirements of jurisdictional competence on the part of the foreign court and of finality of the foreign judgment are present in both systems, albeit the criteria may be interpreted differently. There is also a significant overlap in terms of the defences that are permitted.

11 Of the 15 countries that are covered in this compendium, 13 of them accept that foreign judgments are entitled to recognition and enforcement.[9] Even in the two countries[10] where a litigant has to sue

7 Béligh Elbati, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark But Not Much Bite" (2017) 13 *Journal of Private International Law* 184 at 218.

8 While the statutory schemes provide a more direct procedural mechanism for the enforcement of a foreign judgment, the foreign judgment still has to fulfil certain criteria to qualify for enforcement under the schemes.

9 At the very least, in principle, even if it has not occurred in practice.

10 Indonesia and Thailand.

afresh on the same cause of action despite a prior foreign judgment in his favour, a foreign judgment may have effect in the local proceedings as it can be introduced as evidence. This state of affairs, coupled with the presence of shared criteria for the recognition and enforcement of foreign judgments, is promising for convergence purposes. Of course, one cannot overlook the fact that significant differences do exist, but there is cause to believe that harmonisation of the recognition and enforcement of foreign judgment rules in Asia is no pipe dream. Phase 2 of this project will grapple with this issue.

12 It remains for me to record my gratitude to various persons involved in this project. I would like to thank The Honourable Justice Andrew Phang, Judge of Appeal of the Supreme Court of Singapore, who as the project advisor provided wise counsel and carefully shepherded this project. Professor Yeo Tiong Min, Academic Director of the Asian Business Law Institute ("ABLI"), and Associate Professor Pearlie Koh, have provided helpful input and advice along the way. The contributions of Mark Fisher and Sarah Archer, the two successive Deputy Executive Directors of ABLI (on secondment from Jones Day), have been instrumental to the completion of the first phase of the project. Thanks are also due to the team at Academy Publishing, and to Jerald Soon Shao Wei and Ava Wang Yuxuan, both of whom provided research assistance for the project. Last but certainly not least, I would like to express my deepest gratitude to each and every country reporter involved in this project. Their generosity in lending their time and expertise to this project is very much appreciated.

Country Report
AUSTRALIA

Reporter: **Dr Andrew Bell SC**
Barrister, Eleven Wentworth Chambers, Sydney;
Adjunct Professor of Law, University of Sydney

A INTRODUCTION

1 Decisions of courts of foreign countries may be enforced in Australia in one of two ways. First, in respect of certain courts of countries with which Australia has reciprocal arrangements as specified in the Schedule to the Foreign Judgments Regulations 1992 (Cth) ("FJR"), by registration of the foreign judgment in the Supreme Court of an Australian State or Territory pursuant to the Foreign Judgments Act 1991 (Cth) ("FJA").[1] Subject to a successful application to set aside registration, the foreign judgment takes effect as though it were a judgment of the Supreme Court in which it is registered, and it may be executed according to that court's procedural rules for the execution of judgments. Secondly, in relation to judgments from courts of countries other than those listed in the Schedule to the FJR, these are enforceable in accordance with the common law principles relating to the recognition and enforcement of foreign judgments.[2]

B APPLICABLE REGIMES

2 Under the FJA, reciprocity of arrangements for recognition and enforcement of judgments to which the FJA applies provides the basis for the enforcement in Australia through registration under the FJA of foreign judgments from the courts of countries which are listed in the

1 Special arrangements now apply for New Zealand judgments under the Trans-Tasman Court Proceedings and Regulatory Enforcement Agreement, which entered into force on 11 October 2013.

2 See Martin Davies, Andrew S Bell & Paul Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 9th Ed, 2014).

Schedule to the FJR. A bilateral or multilateral agreement is not strictly required; what is required is that the Governor-General of Australia be satisfied that "substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts".[3] One way that such satisfaction may be secured is through the existence of a bilateral or multilateral agreement.

3 Under the FJA, a final money judgment of a large number of countries including, relevantly for present purposes, the:[4]

(a) Supreme Court of Singapore (High Court and Court of Appeal);
(b) High Court of Hong Kong (comprising the Court of First Instance and the Court of Appeal) and the Court of Final Appeal; and
(c) Supreme Court, Appellate Courts, District Courts, Family Court, Patent Court and Administrative Court of the Republic of Korea

may, within six years of the date of the judgment, be registered in Australia and, subject to any application being made to set aside registration, will take effect as though it was a judgment of the Supreme Court of the Australian state or territory in which the foreign judgment is registered. By reason of section 10(1) of the FJA, a final money judgment from the above mentioned courts may only be enforced in Australia under the FJA.

4 In contrast, to entitle a foreign judgment to recognition at common law in Australia, in a fresh action (which will be founded on the cause of action for a debt that has accrued and is payable based on the judgment rendered in the foreign court),[5] four broad conditions must be satisfied:[6] (a) the foreign court must have exercised a jurisdiction that Australian courts recognise; (b) the foreign judgment must be final and conclusive;

3 Foreign Judgments Act 1991 (Cth) s 5(1).
4 Foreign Judgments Regulations 1992 (Cth) Schedule.
5 *Hong Kong and Macao Glass Co v Gritton* (1886) 12 VLR 128; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450.
6 *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 552 at [18], *per* Bleby J.

(c) there must be an identity of parties; and (d) if based on a judgment *in personam*, the judgment must be for a fixed debt.

5 The onus of establishing the existence of those conditions rests on the party seeking to rely upon the foreign judgment. That party must not only establish that the foreign court had jurisdiction in the international sense,[7] but also that the foreign judgment was final and conclusive according to the law under which it was pronounced.[8] Once that onus is satisfied, the judgment is *prima facie*, entitled to enforcement as a valid obligation, unless the defendant can establish one or more of the recognised defences to the enforcement of a foreign judgment such as that it was procured by fraud, entailed a denial of procedural fairness or that it or its enforcement was contrary to public policy.[9]

6 At common law, reciprocity of enforcement is *not* required for a foreign judgment to be enforced in Australia,[10] and does not provide the theoretical basis for such enforcement. Thus, a judgment of an Indonesian court satisfying the common law requirements for enforcement may be enforced in Australia even though, as a general proposition, foreign judgments, including Australian judgments, are not enforceable in Indonesia.

7 The theoretical underpinnings for the enforcement of foreign judgments at common law in Australia have never been judicially stated, in part no doubt because the relevant principles were inherited from the English common law where final money judgments were enforceable on the basis that they were *prima facie* evidence of a debt. The contemporary theoretical justification for enforcement of a foreign judgment may be seen to rest on the same broad principles that underpin the doctrines of *res judicata* and issue estoppel, namely that where the respective parties have participated in a hearing and or submitted to the jurisdiction of a foreign court that has resulted in a final judgment, then, subject to

7 *R v McLeod* (1890) 11 LR (NSW) 218 at 221, *per* Windeyer J. See also para 14 below.

8 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853.

9 See para 16 below.

10 *Crick v Hennessy* [1973] WAR 74; *Malaysia–Singapore Airlines Ltd v Parker* [1972] 3 SASR 300 at 304.

appellate review, that judgment should not be permitted to be re-opened but should be given effect.

C RECOGNITION AND ENFORCEMENT OF FOREIGN MONETARY JUDGMENTS *IN PERSONAM*

i *Position under the Foreign Judgments Act 1991*

8 Under the FJA, a foreign money judgment given by a court of a country to which Part 2 of the FJA applies, may be registered and then enforced as though it were a judgment of a Supreme Court of an Australian state or territory.

9 A money judgment under the FJA is one under which is payable an amount of money including any interest payable under the law of the country that has rendered the judgment. Under section 6(7)(c) of the FJA, the amount for which a judgment is registered carries interest. Judgments under which amounts are payable in respect of taxes (other than New Zealand tax and Papua New Guinea income tax), fines or other penalties are not registrable under the FJA. Where a foreign money judgment requiring the payment of money but only as to part in respect of tax or a fine or penalty, the judgment may be registered in respect of that part that was not in respect of the payment of tax, a fine or a penalty.

10 Under the FJA, in cases to which Part 2 of that Act applies, for a money judgment to be registrable, it must be final and conclusive. By section 5(4) of that Act, a foreign judgment may be taken to be final and conclusive notwithstanding that:

(a) an appeal may be pending against it; or
(b) it may still be subject to an appeal in the courts of the country of the original court.

11 If the court in which a judgment is registered is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the judgment, the court may order that enforcement of the judgment be stayed pending the final determination of the appeal, until a specified day or for a specified period.

12 A default judgment from a court of a country listed in the Schedule to the FJA may be enforced as a final judgment under the FJA if:[11]

> (i) the judgment debtor voluntarily submitted to the jurisdiction of the [foreign] court; or
>
> …
>
> (iii) … the judgment debtor … had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
>
> (iv) … the judgment debtor …, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
>
> (v) … the proceedings in [the foreign] court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
>
> (vi) … there is an amount of money payable in respect of New Zealand tax under the judgment …

13 The Australian courts are neither required to nor do they examine the merits of the foreign court's judgment at the stage of recognition or enforcement. This is so whether the judgment is being enforced through registration under the FJA or at common law.[12] Accordingly, the courts of Australia cannot refuse to recognise or enforce a foreign judgment because the foreign court made an error of fact or an error of law or both, unless the error of fact or error of law is so egregious that it would mean that the enforcement of the foreign judgment in Australia would be contrary to public policy or its making involved a denial of procedural fairness.

14 The courts of Australia will not recognise or enforce a foreign money judgment where the foreign court did not have jurisdiction "in the international sense" to hear the case. Jurisdiction under the procedural

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11 Foreign Judgments Act 1991 (Cth) s 7(3)(a).

12 *Godard v Gray* (1870) LR 6 QB 139. See also *Ainsle v Ainsle* (1927) 39 CLR 381 at 402, *per* Higgins J; *Norsemeter Holding As v Boele (No 1)* [2002] NSWSC 370 at [14], *per* Einstein J (reversed on other grounds as *Boele v Norsemeter Holding AS* [2002] NSWCA 363); *Benefit Strategies Group Inc v Prider* (2005) 91 SASR 544 at 567, *per* Bleby J; *RDCW Diamonds v Da Gloria* [2006] NSWSC 450 at [31], *per* Rothman J.

and jurisdictional provisions of the foreign court is not relevant in these circumstances. Under the FJA, the courts of the foreign country which has rendered the judgment are taken to have had jurisdiction:[13]

> (a) in the case of a judgment given in an action *in personam*:
>
> (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court; or
>
> (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
>
> (iii) if the judgment debtor was a defendant in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
>
> (iv) if the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
>
> (v) if the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
>
> (vi) if there is an amount of money payable in respect of New Zealand tax under the judgment.
>
> (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action *in rem* of which the subject matter was movable property – if the property in question was, at the time of the proceedings in the original, court situated in the country of that court …

15 Note that section 11 of the FJA provides that contesting a foreign court's jurisdiction or asking a foreign court to decline to exercise jurisdiction does not amount to voluntary submission to the foreign court's jurisdiction.

13 Foreign Judgments Act 1991 (Cth) s 7(3).

16 Under the FJA, an otherwise registrable foreign judgment under the FJA must be set aside where:[14]

> (i) the judgment is not, or has ceased to be, a judgment to which [Part 2 of the FJA] applies; or
> (ii) that the judgment was registered for an amount greater than the amount payable under it at the date of registration; or
> (iii) that the judgment was registered in contravention of [the FJA]; or
> (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
> (v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or
> (vi) that the judgment was obtained by fraud; or
> (vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court;
> (viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
> (ix) that the judgment has been discharged;
> (x) that the judgment has been wholly satisfied; or
> (xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy …

17 In relation to fraud, Australian authority is divided as to whether or not refusal of recognition or enforcement depends upon whether the matter has actually been raised in the foreign court or was capable of being raised in the foreign court. Different rules do not apply to different forms of fraud.

18 In relation to public policy, this is assessed against the foreign judgment itself (and not the original cause of action that was litigated before the foreign court).

19 Under the FJA, the courts of Australia may set aside registration of an otherwise registrable foreign judgment where it conflicts with a

14 Foreign Judgments Act 1991 (Cth) s 7(2)(a).

judgment involving the same parties and same subject matter that is rendered by the court of Australia.[15]

ii *Position at common law*

20 At common law, foreign money judgments other than those involving the payment of tax[16] or a penalty[17] may be enforced in Australia against the foreign judgment debtor.[18] Such enforcement extends to the extent of any interest payable on the foreign judgment up until the time of enforcement. Similar principles to those under the FJA apply in relation to enforcement at common law. That is to say, a foreign tax[19] or penal judgment[20] may not be enforced but a foreign money judgment comprising various components may be enforced to the extent of those components not relating to tax, a fine or a penalty.[21]

21 At common law, judgments which are not final may not be enforced although certain foreign interlocutory judgments may generate an issue estoppel which will preclude an issue finally determined in that interlocutory judgment being re-agitated in an Australian court. Thus there is Australian authority to the effect that a foreign interlocutory

15 Foreign Judgments Act 1991 (Cth) s 7(2)(b).

16 This is subject to statutory exceptions in the case of New Zealand tax and Papua New Guinea income tax; see the definition of enforceable money judgment in s 3 of the Foreign Judgments Act 1991 (Cth).

17 A limited statutory exception exists in respect of tax payable by way of penalty for contravention of a New Zealand tax law: see definition of New Zealand tax in s 3 of the Foreign Judgments Act 1991 (Cth).

18 The leading authorities are identified in Martin Davies, Andrew S Bell & Paul Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 9th Ed, 2014) ch 40.

19 Both attempts at direct enforcement (*Re Visser: Queen of Holland v Drukker* [1928] Ch 877) but also any foreign claim that by indirect means seeks to enforce a foreign revenue debt will be rebuffed. In respect of the latter, see *Government of India v Taylor* [1955] AC 491; *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (NSW) (Pt 1) 44; *Rothwells Ltd (in liq) v Connell* (1993) 119 ALR 538 at 545–546, *per* Fitzgerald P and Williams J and at 548–549, *per* McPherson JA.

20 *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140.

21 *Schnabel v Yung Lui* [2002] NSWSC 15 at [180], *per* Bergin J. See also *Lewis v Eliades* [2004] 1 WLR 692, severing the unenforceable punitive component of an award of damages from an enforceable award of compensatory damages.

judgment which involves a final hearing on the merits on a particular issue (for example, as to whether or not a contract contained an exclusive jurisdiction clause or whether or not such a clause was exclusive or non-exclusive) may generate an issue estoppel which would be given effect to in subsequent Australian proceedings.[22]

22 An Australian court is not required to refuse to recognise or enforce a foreign judgment still amenable to appeal in the foreign court.[23] An Australian court may enforce the foreign judgment by giving judgment in favour of the foreign judgment creditor but stay the enforcement of that Australian judgment pending the outcome of the foreign appeal.[24] Alternatively, in an appropriate case, the Australian enforcement proceedings may be stayed.[25]

23 At common law, to be enforceable, the foreign court that issued the judgment must have had jurisdiction "in the international sense".[26] This requires the defendant in the foreign proceedings to have been served with process whilst in the foreign jurisdiction[27] or to have submitted to the courts of that jurisdiction, either by way of entering an appearance[28]

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22 *Makhoul v Barnes* (1995) 60 FCR 572; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 at [399], *per* Lander J; *Ianasmuch Community Inc v Bright* [2006] NSWCA 99 at [60], *per* Beazley JA; *Castillion v P & O Ports Ltd* [2007] QCA 364 at [54]–[58], *per* Holmes JA.

23 *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287; [1966] 3 All ER 85.

24 *JP Morgan Chase Bank NA v PT Indah Kiat Pulp and Paper Corp* [2012] NSWSC 1279.

25 *XPlore Technologies Corp of America v Tough Corp Pty Ltd* [2008] NSWSC 1267.

26 *R v McLeod* (1890) 11 LR (NSW) 218 at 221, *per* Windeyer J.

27 *Herman v Meallin* (1891) 8 WN (NSW) 38; *Close v Arnot* BC9706194 (21 November 1997) (SC, NSW) Graham AJ.

28 The mere filing of an unqualified appearance amounts to submission (*Victorian Phillip Stephen Photo Litho Co v Davies* (1890) 11 LR (NSW) 257) except in circumstances where the appearance was entered by a solicitor without authority from the client (*Redhead v Redhead* [1926] NZLR 131) or the appearance was withdrawn with the leave of the foreign court or accordance with its rules (*Malaysia Singapore Airlines v Parker* (1972) 3 SASR 300). A litigant who commences proceedings in a foreign court as plaintiff is bound by the outcome whether it favours the plaintiff or not: *Schibsbyv v Westenholz* (1870) LR 6 QB 155 at 166. Nor can the plaintiff complain if the defendant recovers damages by way of set-off, cross-action or counter-claim: *Burpee v Burpee* [1929] 3 DLR 18.

or agreeing by way of contract to submit to jurisdiction. An agreement to submit to jurisdiction will include an agreement to the exclusive or non-exclusive jurisdiction of the courts of that country. At common law, if the judgment debtor has submitted to the jurisdiction of the foreign court notwithstanding the terms of any choice of court agreement, the foreign judgment may be enforced in Australia. However, submission to the foreign court's jurisdiction simply for the purposes of protesting jurisdiction including by reference to the choice of court clause[29] will not be treated as a submission to the foreign jurisdiction.[30]

24 Just as under the FJA, a foreign default money judgment may be enforced as a final judgment at common law provided that the judgment debtor has submitted to the jurisdiction of the foreign court so as to give it jurisdiction in the international sense. Where the (foreign) judgment debtor has not submitted to the foreign court either by agreement (such as a forum or jurisdiction or submission to suit clause) or by appearance and or participation in the foreign proceedings, an Australian court will not regard the foreign court as having had jurisdiction in the international sense and thus a requirement for enforcement at common law will not have been satisfied.

25 As set out above, both under the FJA and at common law, the Australian courts are neither required to nor do they examine the merits of the foreign court's judgment at the stage of recognition or enforcement.

26 At common law, grounds for refusing to enforce a foreign judgment include that:

(a) it was rendered in circumstances involving a denial of procedural fairness. Procedural fairness may involve the lack of a hearing or a fair hearing, or bias on the part of the foreign judge.[31] Whether or not enforcement would be refused on this basis may be

29 *Dunbee v Gilman & Co (Australia) Pty Ltd* (1968) 70 SR (NSW) 219.

30 Foreign Judgments Act 1991 (Cth) s 11(b). However, if the defendant proceeds to argue the merits it is submission: see *Re Williams* (1904) 2 N & S 183; *Bushfield Aircraft Co v Great Western Aviation Pty Ltd* (1996) 16 SR(WA) 97.

31 *Price v Dewhurst* (1837) 8 Sim 279; 59 ER 111.

affected by the existence or otherwise of appeal rights in the foreign jurisdiction, and whether or not they have been exercised.[32]

(b) The foreign judgment conflicts with a judgment involving the same parties and same subject matter that has been rendered by an Australian court.[33] Common law principles of *res judicata* and issue estoppel apply in Australian courts[34] and operate to preclude the recognition of a cause of action or issue estoppel that has already been determined in litigation between the same parties or their privies.

(c) The foreign judgment was procured by fraud.[35]

(d) The foreign judgment or its enforcement would be contrary to public policy.[36]

27 In respect of what would happen at common law if the court in Australia is faced with two conflicting foreign judgments, each of which is entitled to recognition/enforcement in its own right, there is, as far as this reporter is aware, no Australian decision that deals with the issue

32 By analogy with *House of Spring Garden Ltd v Waite* [1991] 1 QB 241.

33 *Vervaeke v Smith* [1983] 1 AC 145. See also *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429.

34 The High Court of Australia in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373; 208 ALR 1 at 7, [21] unanimously adopted Lord Guest's formulation of the test for the doctrine of issue estoppel in *Carl Zeiss Stiftung v Rayner and Keeler (No 2)* [1967] 1 AC 853 at 935.

35 Fraud includes not only actual fraud but also the equitable notion of constructive fraud (see, *eg*, *Larnach v Alleyne* (1862) 1 W & W (E) 342).

36 A foreign judgment may be denied enforcement because it is founded on a law that is not acceptable to the public policy of the forum, for example, a judgment for the wages of a prostitute, or an order for the maintenance of a child not confirmed to minority or other specified period: *Re Macartney* [1921] 1 Ch 522. A foreign judgment may also be contrary to public policy because it was obtained in a manner obnoxious to the law of the forum, such as by duress (*Re Meyer* [1971] P 298) or undue influence (*Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137; [1983] 3 All ER 129). The authors of *Nygh's Conflict of Laws in Australia* consider that the public policy ground for refusal of enforcement should be narrowly confined and the offence against Australian public policy should be profound before refusal to enforce is warranted; see Tamberlin J in *Stern v National Australia Bank* [1999] FCA 1421 at [133]–[147] and Atkinson J in *De Santis v Russo* (2001) 27 Fam LR 414 at 419, [19].

of how the court would determine which judgment should prevail. Australian courts would have regard to decisions of other common law jurisdictions dealing with this issue[37] but would not consider themselves bound to follow or apply such decisions. As a matter of principle, the foreign judgment rendered first in time would be likely to be given priority and therefore to prevail.[38]

D RECOGNITION AND ENFORCEMENT OF FOREIGN NON-MONETARY JUDGMENTS *IN PERSONAM*

i *Position under the Foreign Judgments Act 1991*

28 Under the FJA, provision is made for the enforcement of non-money judgments if the Governor-General is satisfied that, in the event of the benefits conferred by Part 2 of the FJA being applied to all or some non-money judgments given in courts of a country in relation to which this Part extends, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of all or some non-money judgments given in Australian courts.

ii *Position at common law*

29 At common law, foreign non-money judgments will not be enforced *per se* but, in equity,[39] Australian courts have lent their assistance to certain orders of foreign courts appointing receivers and for the taking of an account following the obtaining of a declaration and order for account made in a foreign country in circumstances where there is a sufficient connection between the defendant and the foreign jurisdiction in which the order was made so as to justify recognition of the foreign order.[40]

37 Such as *Showlag v Mansour* [1995] 1 AC 431.

38 *Showlag v Mansour* [1995] 1 AC 431; *People's Insurance Co of China, Hebei Branch v Vysanthi Shipping Co Ltd (The Joanna V)* [2003] 2 Lloyd's Rep 617.

39 *Houlditch v Marquess of Donegal* (1834) 2 CI & F 470.

40 *White v Verkouille* [1990] 2 Qd R 191.

30 In respect of the enforcement of foreign asset-freezing orders (also known as "Mareva injunctions"), strictly speaking Australia does not allow for the enforcement of a Mareva or freezing order, although an Australian court may grant a freezing order over assets of a foreign judgment debtor or a prospective foreign judgment debtor in certain circumstances including where it is intended to enforce the foreign judgment in Australia. This may but need not be in circumstances where a foreign court has also made a Mareva or freezing order.[41]

E RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS *IN REM*

31 Australia does not allow for the enforcement of foreign judgments against property. Both under the FJA and at common law, as a general matter, it is only foreign money judgments that may be enforced.

32 Judgments in relation to interests in property may at common law be recognised in Australia in the sense that an issue estoppel may preclude a party from raising an inconsistent position in any Australian proceedings to that established by the foreign judgment.

F HAGUE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS

33 A Bill, entitled the International Civil Law Bill to implement the Hague Convention of 30 June 2005 on Choice of Court Agreements and the Hague Principles on Choice of Law in International Commercial Contracts and support party autonomy in choice of court and choice of law in international contracts, is expected to be enacted by the Australian Parliament in 2017.

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41 See *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 325 ALR 168; [2015] HCA 36.

Country Report
BRUNEI DARUSSALAM

Reporter: Dr Colin Ong QC
St Philips Stone Chambers (London)

A GENERAL INTRODUCTION

i *Background introduction to the Brunei legal system*

1 As far as civil and commercial laws are concerned, all the statutes, laws, rules and practice in Brunei comprise a single jurisdiction under a system of courts and laws that are modelled on the English common law system. The Judicial Committee of the Privy Council in the UK is still the final Court of Appeal for all civil and commercial matters in cases where the litigants have agreed to subject appeals to the Privy Council. The importation into Brunei law of English statutes of general application and common law and equity up to 25 April 1951 was expressly effected by the Application of Laws Act.[1] This means that English law, especially many of the English statutes before 1951, and the common law, rules of equity, subordinate legislation and customary law in general form part of Brunei law. The entire Brunei Court of Appeal has, to date, always consisted of visiting foreign English and Australian judges who mainly form part of the Hong Kong Court of Final Appeal or are retired Hong Kong High Court judges. The Brunei court tends to rely upon English appellate court decisions as persuasive authority.

ii *Introduction to enforcement of foreign court judgments under Brunei law*

2 The acid test of any international dispute resolution mechanism is the enforceability of the end result of the dispute resolution process. In many disputes involving parties from different states, a judgment that

1 Cap 2, 2009 Rev Ed.

has been handed down from the court will be in a forum where the losing party has no assets. That court judgment will need to be enforced in a jurisdiction that both recognises and also enforces the judgment. In the case of Brunei, there are two regimes that govern this particular aspect of the law on enforcement of foreign court judgments. The first regime is a statutory one and the other regime operates under common law.

3 The enforcement of foreign judgments in Brunei is governed by the Reciprocal Enforcement of Foreign Judgments Act 1996[2] ("REFJA") as well as by common law rules. The REFJA is the only enabling statute to allow foreign judgments of reciprocating countries to be automatically registered and enforced in Brunei. The Brunei REFJA itself is based upon the UK Foreign Judgments (Reciprocal Enforcement) Act 1933[3] and greatly follows the English practices where the statutory provisions are *in pari materia* or are very similar.

4 A successful party who seeks to enforce its foreign court judgment in Brunei will need to be conscious as to (a) the nature of the judgment that he is seeking to have enforced; and (b) whether or not his foreign judgment has been rendered *in personam* or *in rem*.

5 An *in personam* judgment only applies towards the particular parties covered in the judgment and it sets down all of the entitlements between those parties.

6 An *in rem* judgment on the other hand is a judgment that binds a particular property matter and is not directed against a person (*in personam*). In effect, an *in rem* judgment purports to determine rights in the property that are deemed to be conclusive against the world.

7 Both foreign judgments *in personam* or *in rem* in a civil and commercial matter may be enforced by the Brunei courts either through the operation of common law rules or through the REFJA.

8 This report will first deal with the principles under which foreign judgments *in personam* are recognised and enforced in Brunei through

2 S 11/1996; currently Cap 177, 2000 Rev Ed.

3 c 13.

common law, and then under the REFJA. Finally, this report shall deal with the rules which the Brunei courts would apply to foreign judgments *in rem*.

B THE RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENTS ACT AND COMMON LAW RULES

i In personam *judgments*

9 The REFJA operates on the doctrine of reciprocity and therefore Brunei will recognise the civil and commercial judgments of other countries that also recognise and enforce Brunei court judgments (as listed in the Schedule to the REFJA).[4]

10 Section 3(2) of the REFJA provides that the Act shall extend to:

> Any judgment of a superior court of a foreign country to which this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part applies, if —
> (a) it is final and conclusive as between parties thereto; and
> (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty … .

11 To date, the current Schedule to the REFJA lists the "reciprocating countries" (also known as the gazetted countries) as including only

4 Section 3(1) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) provides:

> The Attorney General, if he is satisfied that substantial reciprocity of treatment will be assured as respects the enforcement in a foreign country of judgment given in the High Court of Brunei Darussalam, may by order published in the *Gazette* direct —
> (a) that this Act shall extend to that foreign country; and
> (b) that such courts of that foreign country as are specified in the Act shall be deemed superior courts of that country for the purposes of this Act.

Malaysia and Singapore.[5] The definition of foreign judgment has been defined exceptionally broadly to include:[6]

(a) a judgment or order given or made by a court in any civil proceedings;
(b) a judgment in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party;
(c) an award in proceedings on an arbitration.

12 A foreign judgment from a gazetted country which is registered under the REFJA would be automatically recognised and enforceable in Brunei as if it had been an original Brunei court judgment. A foreign judgment to which the REFJA applies may only be recognised and enforced through its regime.[7]

13 Unlike the REFJA statutory regime which allows for automatic recognition and enforcement of foreign commercial judgments from a gazetted country, it is comparatively harder to recognise and enforce a foreign judgment before the Brunei courts if a claimant has to rely solely on the common law. Where the judgment sought to be enforced upon is from a non-reciprocating country (or it is not from a superior court of a reciprocating country), the only basis of enforcement of that commercial court judgment is by way of common law. This requires the claimant to bring a fresh action in the Brunei court where reliance is placed upon the foreign judgment on the basis of evidence of the claim, as opposed to automatic recognition.

14 A claimant will have to start a fresh action against the foreign judgment debtor by way of a writ of summons for the judgment debt. The foreign judgment that has been obtained from the non-reciprocating country is only at best regarded as evidence in favour of the claimant that there is a debt due and owing, and that a foreign judgment has already been awarded by the courts of the non-reciprocating country. The

5 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) Schedule.

6 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 2(1).

7 See s 7 of the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed).

claimant can then attempt to file a summons in chambers for summary judgment and file a supporting affidavit to the summary judgment application attaching, amongst other evidence of the debt, the copy of the final judgment obtained against the debtor in the court of the non-reciprocating country.

15 In the event that summary judgment is not granted by the High Court Registrar, an appeal may be made to a Judge in Chambers and a final appeal may be made to the Court of Appeal. Alternatively, the claimant may decide to forgo a summary judgment application and set the matter down for a trial. The obligation to pay the judgment debt in Brunei is completely separate from the original cause of action in the foreign court of origin.

16 In general terms, subject to the fulfilment of certain conditions and procedural requirements, all monetary foreign judgments *in personam* are enforceable in Brunei.[8] While there have been no reported Brunei court judgments on the matter, this reporter considers that the Brunei courts would follow the position of the UK in refusing to recognise and enforce foreign declaratory orders, orders of specific performance and permanent injunctions. This is because the wording in section 3(2)(b) of the REFJA is *in pari materia* to that of section 1(2)(b) of the UK Foreign Judgments (Reciprocal Enforcement) Act 1933.

17 Preliminary judgments and orders of foreign courts are not enforceable if they are not final and conclusive.[9] This would apply to enforcement proceedings under both the common law and the statutory regimes. Whilst there has not been any reported decision on the matter, this reporter considers it very likely the Brunei courts would adopt the UK position and not allow enforcement of foreign asset-freezing orders. A foreign judgment will be enforced by the Brunei courts in the same way as they would be enforced by the English courts under the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 and under the same common law rules.

8 This statutory regime only applies to monetary judgments (excluding taxes, fines or penalties). This is also the case under the common law.

9 For a discussion on the meaning of final and conclusive, see para 21 below.

18 This means that foreign judgments will be recognised under Brunei's statutory regime or enforced by an action at common law in Brunei if:

(a) it is on the merits of the case;
(b) it is for a fixed or ascertainable sum of money that is not a tax,[10] fine or other penalty;[11]
(c) it is final and conclusive;[12]
(d) the original court must have acted within its jurisdiction;[13]
(e) the foreign court had international jurisdiction to hear the case according to Brunei conflict of laws rules;
(f) no defences can be raised against enforcement; and
(g) in the case of the REFJA, the Act applies to judgments of a superior court from a reciprocating country.

19 There is no common law rule that the foreign judgment has to be from a superior court of that country. It is accepted practice for an applicant to seek to have the foreign judgment recognised first before taking the subsequent step to enforce the same. This is done purely to raise an issue estoppel against the judgment debtor who may subsequently decide to appear to object to any enforcement process. The same requirements that are applicable for enforcement would also apply

10 See the decision of Roberts CJ in *DSD Dillinger Stahlbau GMBH v Annie Chong* [1988] 2 MLJ 293 who held (at [35]) that "the Brunei courts, in which the common law applies, will not enforce a foreign revenue law – see *Government of India v Taylor* [1955] AC 491, 514 … on the general principle that tax gathering is a matter of administration between the state and those within its jurisdiction".

11 Sections 2(1) and 2(2) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) confines the recognition and enforcement of *in personam* foreign judgments to monetary judgments. See also the case of *The Brunei Investment Agency v Fidelis Nominees Ltd* [2008] JLR 337 (Jersey).

12 Section 3(3) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) makes it clear that a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

13 The original courts will have proper jurisdiction over a dispute relating to a contract if the obligation which is subject to the dispute was to be performed in its jurisdiction. Similarly, the original court will also have jurisdiction to determine a dispute relating to a tort or harmful act which is subject to a dispute taking place in its jurisdiction.

for an application for recognition, save that any foreign monetary judgment should be for a fixed sum of money.

20 Like other Commonwealth countries which adopt English common law as part of their own common law, a foreign judgment which orders payment of a sum which can be ascertained by a simple arithmetical calculation will also be enforceable.[14] In addition, the monetary award must not amount to the direct or indirect enforcement of any foreign penal, revenue or other public laws.[15] Interest on the judgment sum is enforceable at the rate of the original jurisdiction[16] up to the time of registration before the Brunei courts.[17] Once the foreign judgment has been registered as a Brunei judgment, the rate of interest that would be applicable would be the Brunei court rate of interest, which is currently 6% per annum.[18]

21 In order to be deemed final and conclusive, the foreign court judgment must be deemed to be final and unalterable in the foreign court which rendered the judgment.[19] Under the REFJA, it also makes no difference whether or not an appeal may be pending against the original judgment, or that it may still be subject to appeal, in the courts of the

14 *Hutchinson v Gillespie* (1856) 11 Exch 798.

15 *Huntington v Attrill* [1893] AC 150.

16 *Hawksford v Giffard* (1866) 12 App Cas 122 where the Privy Council held that, in an action in Jersey upon an English judgment, the plaintiff was entitled to recover interest at the original English court statutory interest rate upon the judgment and not at the higher Jersey court statutory interest rate.

17 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 4(8).

18 Rules of the Supreme Court (Cap 5, 2001 Rev Ed) O 44 r 18.

19 *Colt Industries Inc v Sarlie (No 2)* [1966] 1 WLR 1287. See also *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90.

country of the original court.[20] Default judgments[21] and interlocutory judgments[22] can be final and conclusive.

22 The key question as to whether the original foreign court had jurisdiction to hear the case will be tested by Brunei's conflict of laws rules. The Brunei courts would deem the original foreign court to have jurisdiction to hear the case if the judgment debtor against whom the judgment was given was (a) either present or ordinarily resident in the jurisdiction or carrying on business at the time of commencement of proceedings; (b) the judgment debtor must have voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the original foreign court; or (c) the judgment debtor, in the original proceedings, must have been properly served with the process of the original foreign court.

23 It is also important to note that the judgment must not have been obtained by fraud or be in respect of a cause of action which, for reasons of Brunei public policy, cannot be entertained by the Brunei court in registering that foreign judgment. To be clear, the cause of action itself must not be against Brunei public policy. Equally, the enforcement of the foreign judgment cannot be contrary to Brunei public policy.[23]

24 Under common law, the Brunei courts will follow English authorities, which take the position that a mere presence, however temporary or short, would suffice in relation to the defendant who is a natural person.[24] However, it is important to note that for automatic recognition and enforcement under the REFJA, the requirement of

20 Section 3(3) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) would deem the judgment to be final and conclusive notwithstanding the fact that an appeal is taking place at the original courts.

21 *Rubin v Eurofinance SA* [2013] 1 AC 236; [2012] UKSC 46. See also *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204; [2005] UKPC 33.

22 *Gustave Nouvion v Freeman* (1889) 15 App Cas 1. In order to be final and conclusive, the interlocutory judgment must make a final decision regarding the rights of the parties in respect of the specific issue.

23 See para 33 below.

24 *Adams v Cape Industries plc* [1990] Ch 433.

residence is critical for both natural persons as well as corporate bodies.[25] Where the judgment debtor is a corporation, the corporation is considered to have its principal place of business or be resident in the foreign jurisdiction if it is carrying on business from a fixed place of business for more than a limited period of time through an agent or through a representative who is carrying on the corporation's business.[26] In addition to having its principal place of business in the foreign country, the REFJA specifically provides that corporate presence is also satisfied if the proceedings there were in respect of a transaction effected through the corporation or at that office or place.[27]

25 It is possible for submission by the judgment debtor to be deemed to have taken place by way of conduct or by way of an agreement to submit. Submission by conduct will have been deemed to occur when the judgment debtor takes a step in the foreign proceedings which went further than challenging jurisdiction and necessarily involved waiving its objection to the jurisdiction of the court.[28] A foreign judgment debtor could be deemed to have submitted to the jurisdiction of the original foreign court where factual circumstances show that there has been no breach of due process to the judgment debtor.[29] This would usually take place in situations where the judgment debtor had taken clear steps in the foreign proceedings such as filing a defence to the claim in that court. It is also entirely possible for the judgment debtor to have taken such steps that would be deemed as significant when understood by reference to the foreign law of the original court.[30]

26 As with most aspects of civil and commercial law matters, the Brunei courts adopt a similar position to that taken by the English

25 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(2)(a)(iv).

26 *Adams v Cape Industries plc* [1990] Ch 433.

27 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(2)(a)(iv).

28 *Schibsby v Westenholz* (1870) LR 6 QB 155; *Harris v Taylor* [1915] 2 KB 580.

29 It is harder for the judgment debtor to get around the foreign judgment if it was ordinarily resident or had its principal place of business in the jurisdiction of the original court but it is still entitled to basic due process.

30 *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90. See also *Rubin v Eurofinance SA* [2013] 1 AC 236; [2012] UKSC 46.

court.[31] They will not allow the Brunei court's rules to be unfair to the judgment debtor/defendant.[32] Submission may also be by way of an agreement between the parties to submit to the jurisdiction of the original foreign court before the commencement of the proceedings in respect of the subject matter of the proceedings.[33] This arrangement is usually made by way of a jurisdictional agreement. Brunei courts will uphold any foreign judgment that has been taken by a foreign court as a result of having taken jurisdiction by way of such a jurisdictional agreement. In the event that a party has obtained a judgment from a court other than the court stipulated in the jurisdictional agreement, this reporter does not consider that there should be any reason why the courts of Brunei would refuse to recognise and enforce a foreign judgment on the basis that it was rendered in breach of such an agreement.

27 Brunei is not a party to the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA"). While senior government members have participated in conferences, there has been no indication made to the Brunei Law Society nor any other body of any intention to enter into the HCCCA in the near future.[34] There does not appear to be any expert designated to look into the matter at present and it remains to be seen if there is enough interest for the Brunei Ministry of Foreign Affairs to enter into this particular convention.

28 In the event that all of the above requirements have been fulfilled, the foreign judgment will be entitled to automatic recognition and

31 The Privy Council made a general statement that in areas of conflict of laws, "no material distinction is to be drawn between the law of Brunei and the law of England": *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 891 (appeal from Brunei).

32 *Murthy v Sivajothi* [1999] 1 WLR 467 at 477D, where the English Court of Appeal held that whether a particular claim should be regarded as related, such that submission in one case should be construed as submission in another, must always be a question of fact and degree.

33 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(2)(a)(iii).

34 To date, Brunei has only entered into one Hague Convention. This is the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

enforcement in Brunei under the REFJA, subject to no effective defences being raised against the recognition and enforcement thereof.

29 The effective defences that may be raised before the Brunei courts include the following:

(a) the foreign judgment was obtained by fraud;
(b) the foreign judgment is contrary to Brunei public policy;
(c) the judgment was obtained in breach of natural justice;
(d) the foreign court judgment conflicts with a Brunei court judgment;
(e) the foreign judgment conflicts with an earlier foreign judgment that is entitled to recognition under Brunei law;
(f) the rights under the foreign judgment are not vested in the person by whom the application for registration was made; and
(g) the judgment debtor, being the defendant before the original foreign court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and he did not appear.

30 The common law grounds for refusal of recognition and enforcement are very similar to those under the statutory regime but they are not identical. Under section 6(1) of the REFJA, the Brunei courts will not recognise or enforce a foreign judgment if the judgment debtor has satisfied the court that there is an appeal pending or that it is entitled to and intends to appeal.[35] Under the common law regime, a foreign judgment will only be enforced if it is final and conclusive. A foreign judgment that is subject to appeal can still be final and conclusive for this purpose. However, recognition and enforcement of foreign judgments under the common law regime is entirely discretionary and the Brunei courts may stay any relevant proceedings if the judgment is still subject to appeal in the state of the original court. It must again be emphasised that under the common law regime, the foreign judgment can be enforced as a debt only by commencing fresh legal proceedings.

35 The wording in s 6(1) of the Brunei Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) is *in pari materia* to that of s 5(1) of the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13).

a Fraud

31 The REFJA provides that fraud is as an absolute defence against the registration of a foreign judgment.[36] At common law, fraud may be deemed to be intrinsic or extrinsic. Fraud is intrinsic when it occurs within the court proceedings itself (for example, where the foreign court judgment relied upon forged evidence). Fraud is extrinsic when it takes place outside court proceedings (for example, bribing or intimidating a witness). Brunei common law does not draw a distinction between the two specie of fraud when considering the enforcement of a foreign court judgment. The meaning of fraud is neither narrow nor precise.

32 The Brunei courts adopt the same broad position as the English courts on the treatment of fraud in enforcement of foreign judgments.[37] The foreign court judgment is impeachable for fraud[38] where (a) fraud had been alleged in the foreign proceedings but the foreign court rejected the allegation of fraud;[39] (b) fraud had not been alleged in the earlier proceedings before the foreign court as the fraud was only discovered thereafter; or (c) fraud had not been raised in the foreign proceedings despite the fact that the judgment debtor who is now relying on the fraud knew at the time of the foreign proceedings and could have then alleged it but chose not to do so.[40]

b Public policy

33 The public policy defence (which also operates under Brunei domestic law as a barrier to enforcing contracts which are illegal for public policy reasons) is rarely invoked before the Brunei courts as the

36 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(2)(a)(iv).

37 See *Jet Holdings Inc v Patel* [1990] 1 QB 335 at 347 where fraud has been held to encompass "every variety of *mala fides* and *mala praxis* whereby one of the parties misleads and deceives the judicial tribunal" (taken from *Spencer Bower and Turner Res Judicata* (Butterworths, 2nd Ed, 1969) at p 323).

38 This rule against fraud applies under both the statutory and common law regimes.

39 See *Jet Holdings Inc v Patel* [1990] 1 QB 335.

40 *Abouloff v Oppenheimer* (1882) 10 QBD 295. See also *Syal v Heyward* [1948] 2 KB 443.

Judiciary does not particularly pay overwhelming homage to this policy.[41] Neither the cause of action nor the enforcement of the foreign judgment can be contrary to Brunei public policy. Such examples could include the attempted enforcement (a) of a foreign judgment that was pursued in breach of an anti-suit injunction granted by a Brunei court; (b) of a cause of action or remedy that is not available in Brunei for public policy reasons; (c) of a foreign judgment rendered for the recovery of foreign taxes and punitive damages; and (d) of any judgment obtained by a breach of fundamental human rights.

c Natural justice

34 Under Brunei and English common law, natural justice encompasses several key rights such as the right of a litigant to a fair hearing and to expect a court to act fairly and not in a biased fashion.[42] Judges are expected to treat litigants equally and there should not be any reasonable suspicion of bias in the conduct of the hearing.[43]

35 Natural justice dictates that a person should be given the right to adequate notification of the date, time, place of the hearing as well as a detailed notification of the case to be met by the claimant.[44] Procedural fairness is a more specific description for one aspect of natural justice in its broadest sense and this is for a defendant to be given sufficient opportunity to defend himself and present his case.

36 The Brunei courts adopt the English courts' position of extending the defence of public policy to any factual circumstances involving

41 Brunei courts often orally cite the dictum of Burrough J in *Richardson v Mellish* (1824) 2 Bing 229 at 252, where he said "against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it you never know where it will carry you".

42 See *Voinet v Barrett* (1885) 55 LJQB 39, where natural justice is described (at 41) as "the natural sense of what is right and wrong".

43 *Porter v Magill* [2002] 2 AC 357; [2001] UKHL 67.

44 *R v Secretary of State for the Home Department; ex parte Doody* [1994] AC 531; [1993] UKHL 8.

procedural defects which are contrary to the courts' view of "*substantial justice*".[45]

37 Under the REFJA, the judgment debtor is entitled to plead the defence that he was not given enough notice or sufficient time to allow him to prepare and defend the proceedings and he did not appear, despite the fact that court process was duly served on him in accordance with the law of the foreign court.[46]

38 Any foreign court judgment which conflicts with a Brunei court judgment will not be entitled to recognition or enforcement. As the UK Privy Council remains the court of final appeal, it is important to refer to judgments emanating from both the Privy Council as well as the English House of Lords.[47] Similarly, in the event that a Brunei court is faced with two conflicting foreign judgments which are each entitled to recognition, the earlier judgment will take priority.[48]

39 The default position is that Brunei courts will give effect to a validly obtained foreign court judgment and will not make enquiries into any errors of fact or law in the original foreign judgment. This means that the Brunei courts will not re-examine the merits of the foreign court judgment.[49] In the event that part of a foreign judgment is found to be objectionable under Brunei public policy, while the remainder is considered to be unobjectionable, the Brunei courts are likely to adopt the position that has been taken by the English courts. The Brunei courts are likely to excise the objectionable part and to enforce the part of the

45 *Adams v Cape Industries plc* [1990] Ch 433 at 567. See Privy Council decision *Prince Jefri Bolkiah v The State of Brunei Darussalam* [2007] UKPC 62.

46 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(1)(a)(iii). For common law defences, see also *Jacobson v Frachon* (1928) 138 LT 386.

47 *Vervaeke v Smith* [1983] 1 AC 145 at 156D. The House of Lords held that the Belgian proceedings came within the rules governing *res judicata* in that the earlier English court decision decided on the very point as the Belgian court. As such the Belgian court decree of nullity was not entitled to recognition.

48 *Showlag v Mansour* [1995] 1 AC 431. The Privy Council made it clear that where there were two competing final foreign judgments, the earlier in time had to be recognised and given effect to the exclusion of the later.

49 *Godard v Gray* (1890) LR 6 QB 139.

judgment that is considered to be unobjectionable. In such a case, it is important the two parts can be clearly identified as separate portions.[50]

ii *Actions* in rem

40 An action *in rem* is an action directed against a property and not against a person (*in personam*). An action *in rem* does not take any notice of the owner of the property but it seeks to determine rights in the property (or "*res*") that are conclusive against the world.[51] In the event that an action *in rem* is successful, the judgment may be enforced against the *res* and the world at large by way of a sale directed by the court.

41 There is a distinction between the enforcement of a judgment *in rem* and one *in personam*. It is rooted in the doctrine of obligation where the successful party to the foreign court proceedings is able, when seeking recognition and enforcement in Brunei, to show that the judgment debtor owed him an obligation by virtue of being bound by the foreign court judgment as *res judicata*.

42 A foreign judgment *in rem* will generally involve a judgment which declares possession over an object or thing, or it can be a judgment which orders the sale of an object in satisfaction of a claim against the object itself. Under common law principles, it would be the enforcing courts of the *lex fori* which will characterise the nature of the foreign judgment. While judgments *in rem* may, by altering the status of a thing, provide or preclude an answer to a claim, at the end of the day, a foreign judgment *in rem* cannot generally purport to alter the status of immovable property

50 The Brunei courts are very likely to follow the English position in *Raulin v Fischer* [1911] 2 KB 93. In that case, the English court severed the objectionable component of the foreign, which was a penal payment based on a criminal sanction. It then enforced only the non-penal component of the foreign court judgment.

51 *Pattni v Ali* [2007] 2 AC 85.

situated in the *lex fori*.[52] By their nature, judgments *in rem* can affect legal status.[53]

43 As Brunei's court of final appeal is the Judicial Committee of the Privy Council in the UK, it is important when considering Brunei law, to look at Privy Council judgments on the subject matter. The Privy Council decision in *Pattni v Ali*[54] gave a narrower definition of what would constitute an *in rem* judgment. This reporter considers that the Brunei court is likely to look at this judgment as well as other Privy Council judgments dealing with enforcement of *in rem* judgments as highly persuasive, if not almost binding authority.

44 In *Pattni v Ali*, the Cayman courts below the Privy Council considered a foreign Kenyan court judgment. The foreign court had issued an *in rem* judgment which was invalidly made as it purported to determine title to and transfer property which was not in the jurisdiction of the Cayman Islands at the time of the judgment. Lord Mance, delivering the judgment of the Privy Council, cited[55] with approval the definition provided by *Jowitt's Dictionary*:[56]

> A judgment *in rem* is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of the thing or person adjudicated upon was not such as declared by the adjudication. Thus the court having in certain cases a right to condemn goods, its judgment is conclusive against all the world that the goods so condemned were liable to seizure. So a declaration of legitimacy is in effect a judgment *in rem*. A judgment of divorce pronounced by a foreign court is in certain cases recognised by English courts, and is then a judgment *in rem* … Judgments *in personam* are those which bind only those who are parties or

52 For example, an *in rem* judgment declaration by a foreign court on title to immovable property in Brunei will not be recognised or enforced by the Brunei courts.

53 For example, a decree absolute in divorce proceedings will dissolve the relationship of marriage between two persons.

54 [2007] 2 AC 85; [2006] UKPC 51.

55 *Pattni v Ali* [2007] 2 AC 85 at [21].

56 *Jowitt's Dictionary of English Law* (Sweet & Maxwell, 2nd Ed, 1977) at pp 1025–1026.

> privies to them; as in an ordinary action of contract or tort, where a judgment given against A cannot be binding on B unless he or someone under whom he claims was party to it.

45 The Privy Council then held:[57]

> Their Lordships are not however concerned with immovables, which represent as stated an exceptional case in private international law. For present purposes, it is the converse of the above propositions relating to movables or intangibles that is important … their Lordships would think it clear that, where a court in state A makes, as against persons who have submitted to its jurisdiction, an *in personam* judgment regarding contractual rights to either movables or intangible property … situate in state B, the courts of state B can and should recognise the foreign court's *in personam* determination of such rights as binding and should itself be prepared to give such relief as may be appropriate to enforce such rights in state B.

46 The Privy Council did not have to consider whether the foreign court had intended to give an *in personam* judgment or an *in rem* judgment, as it came to the conclusion that it was for the Privy Council itself to characterise the effect of the foreign court judgment. It came to the conclusion that it was a judgment *in personam*. As such, where it is possible for a foreign judgment to contain both elements of *in rem* and *in personam* aspects, the Brunei courts may adopt the approach of the Privy Council in carrying out the final judgment of the original court of the foreign state where the facts follow that of *Pattni v Ali*.

47 Brunei courts will very likely follow the Privy Council's ruling under common law that a foreign judgment *in rem* will be recognised and enforceable in Brunei if the property (immovable or movable), which was the subject-matter of the proceedings at the time of the original court proceedings in the foreign state, was located in that foreign state.[58] Brunei courts would also reach the same conclusion if the foreign *in rem* judgment was sought to be enforced under the REFJA.[59]

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57 *Pattni v Ali* [2007] 2 AC 85 at [27].

58 *Pattni v Ali* [2007] 2 AC 85 at [21].

59 Reciprocal Enforcement of Foreign Judgments Act (Cap 177, 2000 Rev Ed) s 5(2)(b).

48 Generally, the same defences against enforcement would be applicable to both foreign *in personam* and *in rem* judgments. Whilst a judgment obtained by fraud will be vitiated, the exception to the rule is where a *bona fide* purchaser has acquired title to property in good faith and for good value.[60]

60 *Louis Castrique v William Imrie* (1870) LR 4 HL 414. Any such judgment *in rem* relied upon will not be defeated.

Country Report
CAMBODIA

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A INTRODUCTION

1 Cambodia is a civil law country which has seen many recent developments in its legal framework and dispute resolution mechanisms. The Civil Code of Cambodia entered into force in December 2011. Cambodia's Civil Procedure Code is slightly older, having been adopted in 2006. Together, the Civil Code and Civil Procedure Code set out the basic legal framework in Cambodia for civil disputes and the procedures to bring them before the Cambodian courts.

2 Along with these laws, Cambodia's judicial system is still in the development phase. In 2015, a new batch of judges and prosecutors were sworn in to increase the capacity of the courts and allow for the creation of more specialised courts, such as courts for commercial matters, and for regional appellate courts, as currently there is only one appellate court located in the capital, Phnom Penh.

3 Cambodia's first treaty related to the enforcement and recognition of foreign judicial awards was entered into in 2013 with Vietnam.[1] This bilateral treaty created the necessary guarantee of reciprocity between Cambodia and Vietnam required under Cambodian law in order for Cambodian courts to consider enforcing judgments from Vietnamese courts.

4 It is in this context of recent legal developments and the addition of new judges to the Cambodian judiciary that Cambodia is to deal with

1 Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam, Cambodia–Vietnam (21 January 2013).

any attempt by a party seeking recognition and enforcement of a foreign judgment related to a civil or commercial matter in Cambodia. In the coming years, we expect to see further developments in this area and to gain a better understanding of how Cambodian courts will deal with attempts to have foreign judgments related to civil and commercial matters recognised and enforced in Cambodia.

B THRESHOLD REQUIREMENTS FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CAMBODIA

5 While there is a legal framework which would allow a Cambodian court to recognise and enforce a foreign judgment, to date, we are unaware of any foreign judgment that has been recognised and enforced, or refused to be recognised and enforced by the Cambodian courts. Therefore, there is some challenge in understanding exactly how the courts will interpret various aspects of the applicable laws.

6 If a party is seeking the recognition and enforcement of a foreign judgment in Cambodia, then an execution judgment must be obtained from a Cambodian court.[2] To do so, a party must file a motion for recognition and enforcement of the foreign judgment with the Cambodian courts and the party filing such motion will bear the burden of proof.

7 The Civil Procedure Code is the primary law in Cambodia governing the recognition and enforcement of a foreign judgment. The Cambodian court will first look to the four threshold requirements under Article 199 of the Civil Procedure Code when determining whether to issue an execution judgment. However, these are not the only considerations that a court must take into account.

8 The four threshold requirements which must be met in order for a final foreign judgment to be deemed valid in Cambodia are as follows:[3]

2 Civil Procedure Code (2006) Art 352(1).

3 Civil Procedure Code (2006) Arts 199(a)–199(d).

(a) jurisdiction is properly conferred on the foreign court by law or by treaty;
(b) the losing defendant received service of summons or any other order necessary to commence the action, or responded without receiving such summons or order;
(c) the contents of the judgment and the procedures followed in the action do not violate the public order or morals of Cambodia; and
(d) there is a guarantee of reciprocity between Cambodia and the foreign country in which the court is based.

9 The first threshold requirement seeks to ensure that the foreign court which issued the judgment had proper jurisdiction. Cambodian law or a treaty to which Cambodia is a party must recognise that the foreign court which issued the judgment had proper jurisdiction[4] over the parties and subject-matter resolved in the judgment. Cambodian courts may also look at any dispute resolution agreement between the parties to consider whether there is proper jurisdiction in light of such agreement.[5]

10 It is possible that a Cambodian court would refuse to recognise and enforce a foreign judgment if it was rendered in breach of a choice of court agreement. Article 199(a) of the Civil Procedure Code requires that jurisdiction be properly conferred by law or by treaty. If there was a valid dispute resolution agreement which included a choice of court provision and a foreign judgment was rendered in breach of it, it is possible that the Cambodian courts could determine that there was no proper jurisdiction conferred by the law or treaty. Further, under Article 199(c) of the Civil Procedure Code, the judgment and procedures followed in the action must not violate the public order or morals of Cambodia.

11 Under the Civil Code of Cambodia, parties generally enjoy the freedom of contract, so long as the terms do not violate any mandatory provision of law or public order and good customs.[6] Therefore, it may also be possible that a Cambodian court may find that a judgment

4 This reporter is unaware of any guidance to determine the proper jurisdiction of the foreign court.
5 Civil Procedure Code (2006) Art 13.
6 Civil Code of Cambodia (2007) Art 354.

rendered in breach of a choice of court agreement would fail to meet the requirements under Article 199(c) of the Civil Procedure Code as to do so would be to recognise a judgment made in breach of the valid agreement of the parties to the agreement.

12 The second threshold requirement seeks to ensure that due process was followed in terms of proper notification of the defendant of any action commenced against such defendant. Cambodian courts must not recognise and enforce a foreign judgment when the losing defendant did not receive service of summons or any other order necessary to commence the action and the defendant also did not respond while not receiving such summons or order. Further, other breaches of due process may also prevent enforcement if such breaches of due process are considered by a Cambodian court as violating the public order or morals of Cambodia.[7] Cambodian courts recognise the principle of "la contradiction"[8] and will look to see if all parties were summoned and had the opportunity to be present together to directly counter-argue the dispute.

13 The third threshold requirement is to ensure that the enforcement of any judgment or the procedures which led to such judgment do not contradict the public order and morals of Cambodia. The terms "public

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7 Civil Procedure Code (2006) Art 199(c).

8 Article 3 of the Civil Procedure Code (2006) states that:

(1) No party shall be tried without being heard or summoned.

(2) The court shall, in all cases, preserve the principle of '*la contradiction*'.

In the explanation on the complaint procedure issued by the Ministry of Justice, the principle of "*la contradiction*" is explained as follows:

> In order to effectively guarantee the right to be heard, the trial shall be made via the summons of all parties in order to appear at the same date and it shall also allow the parties to directly counter-argue. If it allows the court to summon only one party and hear the argument of such party without the presence of another party, it could affect party's confidence on the justice of the trial. In this regard, the provision provides that in principle, the court shall try the case with respect to the principle of '*la contradiction*', *ie*, it shall summon all the parties and let the parties argue and counter-argue to [*sic*] each other (Paragraph 2 of Article 3). There are also some exceptions (Article 200, Article 201, Paragraph 1 of Article 323 *etc*) to this principle of 'la contradiction'. (On the other hand, please read paragraph 4 of Article 548.) [translation by this reporter]

order" and "morals" are not defined under the law and we are unaware of any court decision interpreting the specific meaning of these terms. Interpretation of these terms would be up to the Cambodian courts in respect to the specific case being considered.

14 Any issues related to a judgment fraudulently obtained would raise the question of whether this third threshold requirement is met. If a Cambodian court were to find that a foreign judgment was procured by fraud, the court could determine that the enforcement and recognition of such a judgment would contradict the public order or morals of Cambodia and the court would therefore be unable to recognise and enforce such judgment. It is possible that a Cambodian court may also look at any violation of due process beyond those related to proper service of summons, such as the losing defendant not being given a reasonable opportunity to present his case, as preventing this third threshold requirement from being met. The principle of "la contradiction" is also relevant here.

15 The fourth threshold requirement, a guarantee of reciprocity, is to date the most difficult of the four requirements to meet. Cambodia has only entered into one bilateral treaty related to the recognition and enforcement of a foreign judgment on civil matters. On 21 January 2013, Cambodia and Vietnam entered into the Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam ("Cambodia–Vietnam Judicial Assistance Treaty"). Cambodia then passed the Law Approving the Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam, dated 17 July 2014, in order to ratify this agreement. The details of this treaty are further discussed below.[9]

16 Without the threshold requirement of a guarantee of reciprocity, such as is found in the Cambodia–Vietnam Judicial Assistance Treaty, Cambodian courts will not recognise and enforce a foreign judgment in Cambodia. A guarantee of reciprocity does not expressly need to be found in a treaty, however.

9 See paras 25–27 below.

17 As Article 199(d) of the Civil Procedure Code requires a guarantee of reciprocity between Cambodia and the foreign country in which the court that issued the judgment is based, in order for Cambodia to be able to recognise a foreign judgment, the relevant foreign country would have to have some mechanism to guarantee recognition of a judgment of a Cambodian court in that foreign country. However, we are not aware of any mechanism used by a foreign country other than a treaty that may be deemed to give Cambodia such a guarantee of reciprocity. Further, we are not aware of any current intention of the Cambodian government to become a party to the Hague Convention of 30 June 2005 on Choice of Court Agreements.

C FURTHER CONSIDERATIONS RELATED TO RECOGNITION AND ENFORCEMENT OF A FOREIGN JUDGMENT

18 As the Cambodia–Vietnam Judicial Assistance Treaty and any other future treaty related to enforcement and recognition of a foreign judgment to which Cambodia is a party would contain specific further requirements for and limitations on recognition and enforcement, the discussion that follows will be limited to only common considerations based on Cambodian law and regulations and will not cover any specific requirements under any specific treaty. Please note that recognition and enforcement sought under any specific treaty will include further analysis for determining whether such foreign judgment would be recognised and enforced. Further considerations for the Cambodia–Vietnam Judicial Assistance Treaty are covered below.[10]

19 There are two steps in order to have a foreign judgment recognised and enforced in Cambodia. First, an execution judgment must be obtained from a Cambodian court. Then, after the execution judgment is obtained, a request for enforcement of the execution judgment must be made.

20 As this is a new area of law in Cambodia, it may also be difficult to predict exactly how Cambodian courts will interpret the Civil Procedure

10 See paras 25–27 below.

Code and other laws and regulations which pertain to the enforcement and recognition of a foreign judgment. The Civil Procedure Code does include a commentary that helps provide some insight into how particular articles of that law should be interpreted, including how the four threshold requirements under Article 199 of the Civil Procedure Code would be interpreted.[11]

21 Assuming that the four threshold requirements under Article 199 of the Civil Procedure Code are met, a Cambodian court must still refuse to recognise and enforce a foreign judgment if such judgment is not proven to be final and binding.[12] There is no definition of the term "final and binding" under the Civil Procedure Code. In this regard, the term "final and binding" shall be interpreted in accordance with the laws of the foreign judgment and, in order to enforce such foreign judgment, there must be sufficient proof that such foreign judgment is final and binding. The burden of proof that a foreign judgment is final and binding will rest with the party seeking the recognition and enforcement of such award.

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11 The relevant section of the commentary states:

(1) Normally, a State is not obliged to recognise a foreign judicial order or judgment. However, this article recognises the effect of a foreign judicial order or judgment by fulfilling certain criteria due to the fact that a case may have been already decided and if the court accepts the case to try again, it would be time-consuming and it is also to avoid any inconsistent judicial decision and to ensure the stability of international trade.

(2) For the compulsory execution of foreign judicial order or judgment, the creditor in execution shall have an execution judgment.

(3) For the party who loses the case under the final and binding foreign judicial judgment, [Art 199(b)] requires the foreign court to respect the defense right of such party in respect to the principle of "*la contradiction*". If not, it is the abuse of right of such party in self-defense before the court.

(4) If the foreign judicial order or judgment infringes the public order or good customs of the Kingdom of Cambodia, such foreign judicial order or judgment shall not be effective.

(5) [Art 199(c)] is the international principle that allows two States to reciprocally respect each other in the purpose of interest protection of the two States or private interest of the citizen of the two States.

[translation by this reporter]

12 Civil Procedure Code (2006) Art 352(3).

22 As any foreign judgment would need to be final and binding to be recognised and enforced, it does not appear possible under the current legal framework to have a Cambodian court recognise and enforce an interlocutory judgment or an order to freeze an asset, as neither is likely to be deemed a final and binding judgment.

23 While a Cambodian court would need to determine the finality of a foreign judgment, it would not look into the actual merits of the case. A Cambodian court is not permitted to review the substantive merits of the judgment of the foreign court.[13] Therefore, the courts of Cambodia must not use the grounds that the foreign court made an error of fact, an error of law, or both to refuse to recognise and enforce a foreign judgment.

24 Cambodian courts may also have to consider issues of res judicata when considering recognition and enforcement of a foreign award. Cambodian courts may refuse to recognise and enforce a foreign judgment because it conflicts with a judgment involving the same parties and same subject matter that is rendered by a Cambodian court.[14] There is no express provision in the Civil Procedure Code on how Cambodian courts are to deal with two foreign judgments from two separate foreign courts regarding the same dispute between the same parties.

D CAMBODIA–VIETNAM JUDICIAL ASSISTANCE TREATY

25 The Cambodia–Vietnam Judicial Assistance Treaty covers a variety of issues related to judicial assistance in civil matters, including the service of judicial documents, transferring evidence, summoning of witnesses, and the recognition and enforcement of certain court judgments and decisions as provided in the treaty. The Cambodia–Vietnam Judicial Assistance Treaty defines civil matters to include civil,

13 Civil Procedure Code (2006) Art 352(4).

14 There is no specific provision related to *res judicata* when considering a foreign award. However, the reporter considers that it is likely that this would fall under Article 199(c) of the Civil Procedure Code (2006) as a violation of public order or morals of Cambodia.

marriage and family, business, commercial and labour matters[15] and, among other things, lays out the framework for which each state will recognise and enforce, if necessary, a civil court judgment of the other state, including limitations on the ability to have a civil court judgment of the other state enforced.[16]

26 Under Article 22, there are five conditions which must be met in order for a court judgment or decision (as stipulated under Article 21) to be recognised and enforced under the Cambodia–Vietnam Judicial Assistance Treaty:[17]

1. The case does not fall into the exclusive jurisdiction of the courts of the Requested Party under the national laws of the Requested Party;
2. The litigants or their legal representatives have been duly summoned or declared absent in accordance with the national laws of the Requesting Party;
3. The court judgments or decisions have entered into legal effect and the statutes of limitation for execution of such judgments or decisions have not expired under the national law of the Requesting Party;
4. There has not been a legally effective civil court judgment or decision on the same case that has been made by the court of the Requested Party or there is no judgment or decisions by the court of a third country, which has been recognised for enforcement by the court of the Requested Party, or at the time of recognition of that judgment or decision, the court of the Requested Party has not registered or heard the same case;
5. The recognition and enforcement of the court judgments or decisions and consequences of the recognition and enforcement of such judgments or decisions shall not contradict the fundamental principles of law and public order of the Requested Party.

15 This would mean that a foreign judgment on a public dispute matter, such as a judgment on a foreign penal, revenue or other public law, is not enforceable via this treaty.

16 Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam (21 January 2013) Arts 1 and 20–25.

17 Article 21 of the Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam (21 January 2013).

27 These five requirements are in addition to the requirements under Articles 199 and 352 of the Civil Procedure Code for recognition and enforcement, though there is overlap between the requirements under this treaty and the Civil Procedure Code. Both the treaty and the Civil Procedure Code are concerned with proper jurisdiction, proper service of summons, the final and binding nature of the judgment, and that the recognition and enforcement of a judgment does not violate public order.[18]

E ENFORCEMENT OF A FOREIGN JUDGMENT[19]

28 If the four threshold requirements are met and a foreign judgment is found to be final and binding, it is then that a Cambodian court would issue the execution judgment. The Civil Procedure Code provides for different types of executions of judgments.[20]

29 Book Six of the Civil Procedure Code covers executions of judgments, including execution judgments issued for foreign judgments and foreign arbitration awards.

30 Chapter Two of Book Six of the Civil Procedure Code provides for the following types of executions of claims having the object of monetary payment:

(a) executions against movables;
(b) executions against claims and other property rights;
(c) execution against immovable; and
(d) execution against vessels.

18 See Articles 199(a), 199(b) and 199(c) of the Civil Procedure Code (2006) and Articles 21(2), 21(3) and 21(5) of the Agreement on Mutual Judicial Assistance in Civil Matters between the Kingdom of Cambodia and the Socialist Republic of Vietnam (21 January 2013).

19 This section (paras 28–35) also covers the rules for the execution of a judgment falling within the scope of the Cambodia–Vietnam Judicial Assistance Treaty.

20 Civil Procedure Code (2006) Book Six.

31 Chapter Three of Book Six of the Civil Code also provides specific additional rules for execution of an enforcement of security interests against movables, against claims and other property rights, against immovable, and against vessels.

32 Chapter Four of Book Six of the Civil Code provides for the execution of claim rights of which the subject-matter is not money.

33 Therefore, under the Civil Procedure Code, there is potential to enforce both foreign money judgments[21] and foreign non-money judgments.

34 There is no provision in the Civil Procedure Code which restricts the enforcement of an *in rem* judgment. Therefore, an *in rem* judgment is potentially subject to recognition and enforcement by the Cambodian courts. However, Article 199(c) of the Civil Procedure Code requires that the judgment and procedures followed in the action must not violate the public order or morals of Cambodia. There is no definition of "public order" or "morals" provided under the laws. Therefore, these terms will be interpreted by the court. Whilst there is potential to have an *in rem* judgment recognised and enforced in Cambodia based on the current legal framework, the Cambodian courts would need to ensure that any such recognition and enforcement does not violate the public order and morals.

35 Further, Article 15 (Exception in case of statutory exclusive jurisdiction) of the Civil Procedure Code states that "the provision of Article 13 (Jurisdiction by agreement) and 14 (Jurisdiction as a result of failure to raise objection) shall not apply to actions regarding which exclusive jurisdiction is conferred by law". Therefore, it may be possible that a Cambodia court may find that an *in rem* judgment rendered in

21 If the foreign judgment includes interest as part of the decision, presumably the interest should be recognisable and enforceable as part of the judgment.

violation of the exclusive jurisdiction of the courts of Cambodia[22] is a failure to comply with Article 199(c) of the Civil Procedure Code.

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22 In accordance with the commentary on Article 15 of Civil Procedure Code (2006), the exclusive jurisdiction conferred by law are (a) Retrial court; (b) motion seeking issuance of demand ruling; (c) exclusive jurisdiction (compulsory execution); and (d) exclusive jurisdiction (preservative relief).

Country Report
THE PEOPLE'S REPUBLIC OF CHINA

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A INTRODUCTION

1 There are three regimes applicable to recognising and enforcing judgments in civil and commercial matters in China: the regime applicable to countries which have concluded bilateral treaties or conventions with China, the regime applicable to countries under the Civil Procedure Law of the People's Republic of China[1] ("CPL") and the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law ("SPC Judicial Interpretation"),[2] and the special regimes for Hong Kong SAR,[3] Macau SAR[4] and Taiwan

1 Issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013.

2 Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law *Zhu Shi* [2015] No 5 (issued 30 January 2015; enacted 4 February 2015) ("SPC Judicial Interpretation"). Under the Chinese legal system, the SPC Judicial Interpretation which has binding force on lower courts is one of the most important sources of international civil procedure law.

3 The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Between Parties Concerned 2008 ("Chinese Mainland–Hong Kong SAR Arrangement 2008"); the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases by the Courts of the Mainland and of the Hong Kong Special Administrative Region (issued on 20 June 2017) ("Chinese Mainland–Hong Kong SAR Arrangement 2017"). The Chinese Mainland–Hong Kong SAR Arrangement 2017 aims to ensure that parties in the Hong Kong Special Administrative Region and Chinese Mainland can enforce relevant civil judgments in matrimonial and family cases through a clear and effective legal regime. The Chinese text is available at http://www.doj.gov.hk/eng/public/pr/20170620_pr2.html (accessed 3 July 2017).

4 Arrangement between the Mainland and Macau Special Administrative Region on the Mutual Acknowledgment and Enforcement of Civil and Commercial Judgments 2006 ("Chinese Mainland–Macau SAR Arrangement").

Region.[5] The rules for recognition and enforcement under the bilateral treaties and the special arrangements between Chinese Mainland and Hong Kong SAR and Macau SAR and the special provisions for Taiwan Region are largely similar to each other. This report will address the rules for recognition and enforcement of foreign judgments under treaty and under the principle of reciprocity in civil and commercial matters.

B RECOGNITION AND ENFORCEMENT UNDER TREATY

2 As of July 2017, China had concluded bilateral judicial assistance agreements with approximately 37 countries, among which 33 treaties have special provisions governing the recognition and enforcement of foreign judgments in civil and commercial matters.

3 China has entered into such bilateral treaties with Laos, Singapore, South Korea, Thailand and Vietnam.[6] However, only the agreements with Laos and Vietnam have special provisions on the recognition and enforcement of a foreign judgment.

4 China is currently not a party to any conventions governing the recognition and enforcement of foreign judgments, except the ratification of articles in the International Convention on Civil Liability for Oil Pollution Damage 1969 ("1969 Convention"). In 1980, China ratified the 1969 Convention, which includes an article on the recognition and enforcement of judgments from courts of contracting states.[7] China, Australia, Brunei Darussalam, Cambodia, India, Indonesia, Japan, Malaysia and Singapore are member states of this Convention. Accordingly, China would recognise and enforce judgments from these countries regarding oil pollution damage in accordance with the 1969 Convention.

5 Provisions of the Supreme People's Court in respect of the Acknowledgment and Enforcement of the Civil Judgments Rendered by Courts in Taiwan Region 2015 ("Chinese Mainland–Taiwan Region Provisions").

6 Available at http://www.moj.gov.cn/sfxzws (accessed 2 July 2017).

7 International Convention on Civil Liability for Oil Pollution Damage 1969, Art 10.

Country	Bilateral agreements with China	Bilateral agreements include recognition and enforcement provisions	Hague Convention of 30 June 2005 on Choice of Court Agreements	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
Australia				✓
Brunei Darussalam				✓
Cambodia				✓
India				✓
Indonesia				✓
Japan				✓
Laos	✓	✓		✓
Malaysia				✓
Myanmar				✓
Philippines				✓
Singapore	✓		✓	✓
South Korea	✓			✓
Thailand	✓			✓
Vietnam	✓	✓		✓

5 In determining whether to recognise and enforce a foreign judgment under treaty, the factors considered are set out below. The bilateral treaties deal with the nature of the defences that may be raised against the foreign judgment (*ie*, whether mandatory or non-mandatory) in different ways. In respect of the Sino–Laos Agreement all the defences

set out in the treaty are mandatory,[8] whilst under the Sino–Vietnam Agreement they are all non-mandatory.[9]

(a) **The finality of the judgment**. According to the law of the rendering state, the judgment must be final, conclusive and enforceable. That the judgment must be enforceable under the law of the enforcing state is sometimes also required, such as under the Sino–Laos Agreement.[10]

(b) **The competent jurisdiction of the rendering court**. The bilateral treaties dealing with foreign judgments have unanimously and explicitly provided for this jurisdictional requirement. There are three different approaches adopted by the various treaties. First, the treaties expressly provide the jurisdictional grounds which the rendering court must satisfy. In addition, there is no infringement of the exclusive jurisdiction of the court of enforcement. That is to say, the rendering court must meet both the requirement for jurisdiction as laid down in the treaties and the requirement that there is no infringement of the exclusive jurisdiction of the court of enforcement.[11] Second,

8 See Art 21 of the Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and Lao PDR (25 January 1999) ("Sino–Laos Agreement"). See also the agreements with France, Russia and Italy.

9 See Arts 4 and 21 of the Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Socialist Republic of Vietnam (25 October 1998) ("Sino–Vietnam Agreement"). In addition, some bilateral treaties embrace both mandatory and non-mandatory defences. See, for example, Arts 9 and 18(4) of the Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the People's Republic of Mongolia (31 August 1989) ("Sino–Mongolia Agreement").

10 Article 21(1)(6). A French judgment was not recognised on the ground of lack of proof of conclusiveness and enforceability: (2005) WEN MIN SAN CHU ZI No 155 ((2005)温民三初字第155号).

11 Article 18 of the Sino–Vietnam Agreement and Art 22 of the Sino–Laos Agreement. The jurisdictional grounds in the above two articles are almost the same. Under one of the following circumstances, the courts of the contracting party should be deemed to have jurisdiction over a civil and commercial case: (a) the defendant has domicile or residence in the jurisdiction when the action is brought; (b) the defendant has a representative office in the jurisdiction when the action is brought targeting the commercial action of the defendant; (c) the defendant submits to the jurisdiction in writing; (d) the defendant defends the case substantially and does not object to the lack of jurisdiction; (e) in contractual

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the treaties expressly require that the exclusive jurisdiction of the court of enforcement should not be infringed.[12] Third, the rendering court must have jurisdiction in accordance with the law of the enforcing state.[13] Both the Sino–Vietnam Agreement[14] and the Sino–Laos Agreement[15] adopt the first approach.

(c) **Due process**. Denial of "due process" is one of the most prominent grounds for refusal of recognition and enforcement of foreign judgments; the fact that the absent losing party was not duly served[16] or the incapable party was not properly represented in the foreign proceedings offers a good defence to the recognition and enforcement of the judgment.[17] Most of the Sino-foreign bilateral judicial assistance agreements, including the Sino–Laos and Sino–Vietnam Agreements, stipulate that the law of the rendering court applies to determine whether there has been sufficient due process.[18] Some do not touch on this

disputes, the contract is concluded or performed or to be performed or the subject matter of the claim is located in the jurisdiction; (f) in non-contractual cases, the tortious action or the result of the torts occurs in the jurisdiction; or (g) the immovable in dispute is located in the jurisdiction.

12 Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Russian Federation (19 June 1992) ("Sino–Russia Agreement") Art 20(2).

13 Agreement on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the Federative Republic of Brazil (31 May 2009) ("Sino–Brazil Agreement") Art 23(2).

14 Sino–Vietnam Agreement, Art 18.

15 Sino–Laos Agreement, Art 22.

16 Uzbekistan and French judgments were refused recognition on the ground of lack of proper notice as stipulated in the bilateral treaty: (2011) MIN SI TA ZI No 18 ((2011)民四他字第18号); (2016) XIANG 10 XIE WAI REN No 1 ((2016)湘10协外认1号); a Polish judgment was recognised in accordance with the bilateral treaty and the Civil Procedure Law of the People's Republic of China, in which the issues of limitation period and due process were discussed: (2013) ZHE YONG MIN QUE ZI No 1 ((2013)浙甬民确字第1号).

17 Wenliang Zhang, "Recognition and Enforcement of Foreign Judgments in China: The Essentials and Strategies" (2014) XV *Yearbook of Private International Law* 319 at 340.

18 Sino–Laos Agreement, Art 21(3); Sino–Vietnam Agreement, Art 17(3).

issue.[19] A few other agreements make the following distinction: the issue of proper representation is governed by the law of the recognising state, while sufficient notice is governed by the law of the rendering state.[20]

(d) **No irreconcilable judgments**. Some bilateral treaties, including the Sino–Laos Agreement, provide that if a court of the recognising state has rendered a judgment or a third country's judgment on the same cause of action between the same parties has been recognised and enforced in China prior to the addressed judgment, the court must refuse to recognise and enforce the judgment.[21] Other bilateral treaties, including the Sino–Vietnam Agreement, provide that the recognising court may refuse to recognise and enforce the foreign judgment on the ground that a court of the recognising state has been seised with a case concerning the same cause of action between the same parties.[22] While some other treaties provide that the court of the recognising state may not refuse to recognise and enforce a judgment just because it has been seised with the underlying case, it may refuse to recognise the foreign judgment only when it has been seised first.[23]

19 See the mutual judicial assistance agreements between China and France, Brazil, Peru, and Bosnia and Herzegovina.

20 See Art 21(4)(5) of the Agreement on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the United Arab Emirates (21 April 2004) ("Sino–United Arab Emirates Agreement") and Art 21(4)(5) of the Agreement on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the State of Kuwait (18 June 2007) ("Sino–Kuwait Agreement").

21 Sino–Laos Agreement, Art 21(5); Agreement on Judicial Assistance in Civil and Commercial Matters between the People's Republic of China and the French Republic (4 May 1987) ("Sino–French Agreement"), Art 22(6); Agreement on Judicial Assistance in Civil Matters between the People's Republic of China and the Republic of Italy (4 May 1987) ("Sino–Italy Agreement") Art 21(4).

22 Sino–Vietnam Agreement, Art 17(4); The Agreement on Judicial Assistance in Civil and Criminal Matters between the People's Republic of China and the Republic of Poland (5 June 1987) ("Sino–Poland Agreement"), Art 21(5); Sino–Russia Agreement, Art 20(4).

23 Sino–Italy Agreement, Art 21(5); Sino–Mongolia Agreement, Art 18(4).

(e) **Public policy**.[24] The recognition and enforcement of the foreign judgment must not be contrary to the basic principles of law, public order or public interests, or infringement of the sovereignty or security of the countries addressed.

(f) **Fraud**. Whether a judgment obtained by fraud is entitled to recognition and enforcement has not been touched on in any of the bilateral treaties. However, the 1969 Convention[25] and the Chinese Mainland–Hong Kong SAR Arrangement 2008[26] embraced the non-recognition ground of a judgment obtained by fraud.

C RECOGNITION AND ENFORCEMENT UNDER THE PRINCIPLE OF RECIPROCITY

6 To recognise and enforce foreign judgments from a country with which China has no agreement is to meet the needs of international civil and commercial communications or transactions and to benefit cross-border stakeholders.[27]

7 Where there are no bilateral or multilateral agreements, judgments from foreign countries can be recognised and enforced in accordance with the CPL[28] under the principle of reciprocity.[29] Having reciprocal

24 See further paras 34–35 below.

25 International Convention on Civil Liability for Oil Pollution Damage 1969, Art 10(1).

26 *Ie*, The Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements Between Parties Concerned 2008, Art 9(5). Article 9(2) of the Chinese Mainland–Hong Kong SAR Arrangement 2017, which covers civil judgments in matrimonial and family cases, also provides for fraud as a ground of non-recognition.

27 See *Private International Law* (Han Depei ed) (Higher Education Press & Beijing University Press, 3rd Ed, 2014) at p 537.

28 Articles 281 and 282.

29 The Civil Procedure Law of the People's Republic of China's standard of review provision does not specify some of the common grounds for non-recognition, such as competent jurisdiction. In practice, however, as reflected in the Sino-foreign

(*continued on the next page*)

relations is a fundamental prerequisite to the recognition and enforcement of foreign judgments. Furthermore, under the SPC Judicial Interpretation, where neither special treaties nor reciprocal relations exist, the people's courts must refuse to recognise and enforce the addressed judgment. Once the claim for recognition and enforcement is dismissed, the party may bring a fresh action in the Chinese courts.[30]

8 Compared to under the treaties and agreements with other countries, there are less preconditions or defences in the CPL. While the SPC Judicial Interpretation makes further clarification, this reporter considers that it would be desirable to enact more detailed rules to fill in the gaps in legislation and practice in order to reduce the uncertainty of recognition and enforcement of foreign judgments.

9 In addition to reciprocity, in general, a foreign judgment will be recognised and enforced if: (a) it is legally effective; (b) the rendering court has competent jurisdiction; (c) it is not in breach of due process; (d) it is not in conflict with an earlier judgment; (e) it is not contrary to public policy. With regard to these requirements, the lack of reciprocal relations and breach of due process are the grounds most frequently invoked for non-recognition in judicial practice.

10 Note that there are special rules for the recognition of foreign divorce judgments and bankruptcy judgments in Chinese Mainland.[31]

i *Reciprocity*

11 Under Chinese law,[32] reciprocity is a fundamental prerequisite to recognising and enforcing a foreign judgment (except a divorce

bilateral treaties for judicial assistance, a Chinese court must or may refuse to recognise and enforce a foreign judgment on ground of lack of jurisdiction.

30 SPC Judicial Interpretation, Art 544.

31 The Supreme People's Court's Provisions on the Procedure of Chinese Citizens' Application for Recognising and Enforcing Foreign Divorce Judgments and Article 5 of the Bankruptcy Act. Article 544 of the SPC Judicial Interpretation affirms that the reciprocity requirement is irrelevant to divorce judgments.

32 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 281.

judgment). In practice, the most influential case regarding the reciprocity requirement is the *Gomi Akira* case in 1995.[33] In the many years following the Supreme People's Court's opinion in *Gomi Akira*, the local Chinese courts have adhered to and echoed the Supreme People's Court's basic holding, which is to the effect that the reciprocity requirement is proved by reference to earlier judgments from the recognising state that have been recognised in the courts of the rendering state. That is to say, the Chinese courts require that *de facto* reciprocity be established; it should be shown that the foreign rendering court had once recognised a Chinese judgment. If there had been no previous attempt to enforce a Chinese judgment in the foreign country, the existence of reciprocity would be denied. South Korean,[34] Australian,[35] English,[36] Chadian,[37] Malaysian[38] and US[39] judgments have been denied recognition and enforcement on the ground of lack of reciprocal relations between China and those countries. However, German,[40] Singapore[41]

33 See Gomi Akira's Application for the Recognition and Enforcement of Japanese Judgments before the Intermediate People's Court of Dalian City, Gazette of the Supreme People's Court of the PRC No 1, 1996, at p 29. For details of the case, see Wenliang Zhang, "Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the 'Due Service Requirement' and the 'Principle of Reciprocity'" (2013) *Chinese Journal of International Law* 143 at 153–155 and Béligh Elbalti, "Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but not Much Bite" (2017) 13(1) *Journal of Private International Law* 184 at 202.

34 (2011) SHEN ZHONG FA MIN YI CHU ZI No 45 ((2011)深中法民一初字第45号); (2015) SHEN ZHONG MIN SI TE ZI No 2 ((2015)沈中民四特字第2号).

35 (2006) MIN SI TA ZI No 45 ((2006)民四他字第45号).

36 (2004) ER ZHONG MIN TE ZI No 928 ((2004)二中民特字第928号).

37 (2014) TAN ZHONG MIN SAN CHU ZI No 181 ((2014)潭中民三初字第181号).

38 (2014) NING MIN REN ZI No 13 ((2014)宁民认字第13号).

39 (2016) GANG 01 MIN CHU No 354 ((2016)赣01民初354号).

40 (2012) E WUHAN ZHONG MIN SHANG WAI CHU ZI No 00016 ((2012)鄂武汉中民商外初字第00016号).

41 (2016) SU 01 XIE WAI REN No 3 ((2016)苏01协外认3号).

and US[42] judgments were recognised and enforced as the Chinese court held that reciprocal relations had been established.

12 The attitude to the factual existence of reciprocity is loosening. In the Nanning Declaration, which was approved at the 2nd China–ASEAN Justice Forum on 8 June 2017 in Nanning, Guangxi Province, China, the seventh consensus is to promote the mutual recognition of civil and commercial judgments. It shows that, even if there is no treaty relation, the existence of reciprocity may be presumed to have been established where there is no precedent of non-recognition and enforcement based on lack of reciprocity.[43] The situation is expected to change in the near future.[44]

ii *Finality of the foreign proceedings*

13 Under the CPL, the foreign judgment must be final and conclusive.[45] However, there is no express legislation or reported cases dealing with the issue of the law applicable to the finality of a foreign judgment. It has been suggested that the law of the rendering state shall apply to determine the finality of a foreign judgment.[46]

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42 On 30 June 2017, the Wuhan Intermediate People's Court rendered a decision recognising and enforcing a civil judgment of the Los Angeles Superior Court in California, US, under the principle of reciprocity. This is the first time that a US commercial judgment was recognised and enforced in China: (2015) E WUHAN ZHONG MIN SHANG WAI CHU ZI No 00026 ((2015) 鄂武汉中民商外初字第00026号).

43 http://www.court.gov.cn/zixun-xiangqing-47372.html (accessed on 2 July 2017).

44 The Supreme People's Court is drafting a new judicial interpretation on the recognition and enforcement of foreign judgments to improve the relevant system. See Zhang Yongjian, "On the Judicial Safeguards to the 'Belt and the Road'" (2017) 1 *China Applied Jurisprudence* (《中国应用法学》) 157 at 164.

45 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 281.

46 See *Private International Law* (Li Shuangyuan & Ou Fuyong eds) (Beijing University Press, 3rd Ed, 2015) at p 417; *Private International Law* (Han Depei ed) (Higher Education Press & Beijing University Press, 3rd Ed, 2014) at p 540 and Xu Hong, *The International Civil Judicial Assistance* (Wuhan University Press, 2nd Ed, 2006) at p 295.

14 In most of the bilateral treaties, including the Sino–Vietnam Agreement, which China has concluded, the law of the rendering court applies to determine the finality and conclusiveness of its judgment. Only occasionally, such as in the Sino–Laos Agreement, does the law of the recognising court also apply to determine the enforceability of the foreign judgment.[47] It may be reasonable to presume that the Chinese court may mirror the majority practice of the bilateral treaties such that a judgment which is enforceable according to the law of the rendering state is enforceable in China.[48]

15 In the Chinese domestic law context, a judgment with legal effect mainly implies the non-existence or the exhaustion of the remedy of appeals, that is to say, in general, finality means that the judgment is not subject to any ordinary form of review. According to Chinese domestic law, a judgment which is being challenged in a higher court may be enforced once preconditions are met.[49] The enforceability will not be affected if a party applies for a judicial supervision proceeding

47 Sino–Laos Agreement, Art 21(6); The Agreement on Judicial Assistance in Civil, Commercial and Criminal Matters between the People's Republic of China and the Republic of Cyprus (25 April 1995) ("Sino–Cyprus Agreement"), Art 25(8). This means that both the law of the rendering court and the law of the recognising court must deem the judgment to be final and conclusive.

48 Xu Hong, *The International Civil Judicial Assistance* (Wuhan University Press, 2nd Ed, 2006) at p 295.

49 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Arts 106 and 107. Article 106 provides that "[u]pon the request of a party, the court may make a ruling for preliminary enforcement in the following cases: (1) Claims for overdue alimony, maintenance, child support, pensions for the disabled or the family of the deceased, or medical expenses. (2) Claims for remuneration for labour; (3) Urgent circumstance that require preliminary enforcement".

Article 107 provides that:

1. The relationship of rights and obligations between the parties is evident and without the preliminary enforcement, the life, production activities or business of the applicant would be seriously affected;
2. The respondent is capable of performing the ruling for preliminary enforcement. The court may order the applicant to provide security. The applicant losing the action shall compensate the respondent for any loss resulting from the preliminary enforcement.

(Zai Shen).[50] However, the courts of China must stay enforcement proceedings once the case is pending for appeal or is reopened for judicial supervision. Once the court decides to reopen the case, the enforcement proceedings must be stayed, except for judgments involving maintenance expense, survivor's pension, medical expense, and payment of labour, *etc*.[51]

16 A default judgment may be recognised and enforced only if the applicant (judgment creditor) can submit documents proving that the judgment debtor was duly served or the judgment expressly stated the fact of proper service.[52] In judicial practice, a default judgment from the Singapore court was recognised in 2016.[53] A default judgment from a US court was recognised in 2017.[54]

17 No express legislation is found in respect of the enforceability of an interlocutory judgment. In a decision, an interlocutory judgment (a divorce judgment) made by an American court was considered to be legally effective and recognised in accordance with Articles 281 and 282 of the CPL.[55] In general, an interlocutory judgment may be enforced once the requirements for judgment recognition and enforcement are met.[56]

50 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 199. Article 11 of the Chinese Mainland–Hong Kong SAR Arrangement 2017 provides that where the case is pending for appeal or is reopened for judicial supervision, the court may stay the proceedings for recognition and enforcement.

51 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 206.

52 SPC Judicial Interpretation, Art 543.

53 (2016) SU 01 XIE WAI REN No 3 ((2016)苏01协外认3号).

54 (2015) E WUHAN ZHONG MIN SHANG WAI CHU ZI No 00026 ((2015)鄂武汉中民商外初字第00026号).

55 (2016) SU 04 XIE WAI REN No 3 ((2016)苏04协外认3号).

56 See Xu Hong, *The International Civil Judicial Assistance* (Wuhan University Press, 2nd Ed, 2006) at p 294; Qian Feng, *Studies on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (China Democracy and Law Press, 2008) at p 82.

iii *Jurisdiction of the foreign court*

18 The CPL and the SPC Judicial Interpretation do not refer to the requirement of jurisdiction of the foreign court, except for one article in the Supreme People's Court provisions on divorce judgment recognition which clearly requires that the foreign court must have jurisdiction.[57] The above provisions also keep silent on which law applies to determine the issue of the proper jurisdiction of the foreign court. However, it is widely recognised by scholars that the foreign court must have competent jurisdiction over the case.[58]

19 As mentioned above, there are three different ways in which the bilateral treaties handle the issue of jurisdiction of the rendering court. This reporter considers that it is reasonable to deduce that the court of origin must have jurisdiction in accordance with its own law[59] and the exclusive jurisdiction of the court of enforcement should not be infringed.[60] Under the CPL, Chinese courts have exclusive jurisdiction over certain types of cases,[61] such as disputes relating to immovables located in China. If the assumption of jurisdiction by a foreign court conflicts with the exclusive jurisdiction of the Chinese court, it will refuse to recognise or enforce the foreign judgment.

57 SPC Provisions on the Procedure of Chinese Citizens' Application for Recognising and Enforcing Foreign Divorce Judgments, Art 12(2).

58 Li Shuangyuan, Xie Shisong & Ou Fuyong, *Introduction to the Law of International Litigation* (Wuhan University Press, 2016) at p 501.

59 In a decision, the court analysed the conditions the German divorce judgment must satisfy, especially the jurisdiction of the German court under German law, and finally the divorce judgment was recognized: (2014) HE MIN SI CHU ZI No 00001 ((2014)合民四初字第00001号).

60 See Art 22 of the Sino–Laos Agreement; Art 18 of the Sino–Vietnam Agreement and Art 9 (3) of the Chinese Mainland–Hong Kong SAR Arrangement 2008. See also Guangjian Tu, *Private International Law in China* (Springer, 2016) at p 173.

61 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Arts 33 and 266.

iv *Merits review*

20 In the view of the legislation and judicial practice, it has been accepted that only deficiency or defect of procedure of legal proceedings may be challenged in Chinese courts. The merits of the foreign judgment are not subject to review. The courts of China will not retry the merits of the underlying case and will not question the foreign court's determination on the facts and application of law. Accordingly, the courts of China would not refuse to recognise and enforce a foreign judgment on the ground that the foreign court made an error of fact or an error of law or both.[62]

v *Money or non-money judgments*

21 The wording of Chinese law does not distinguish between the recognition and enforcement of monetary and non-monetary foreign judgments. Further, there is no special rule for default interest on a judgment. Generally, China allows for the enforcement of foreign monetary judgments in civil and commercial matters and the judgment creditor is entitled to default interest.[63]

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62 In a case on the recognition of a Macau judgment involving a contract of loan, the party resisting recognition argued that the fact of borrowing did not exist between the parties. However, the court held that the existence of the debt was not subject to review. The judgment was recognised in accordance with the Chinese Mainland–Macau SAR Arrangement and enforceable as a domestic one: (2014) HU ER ZHONG MIN REN (MACAU) ZI No 1 ((2014)沪二中民认(澳)字第1号). In recognising the US court judgment, the court held that the validity of the contract as an issue involving the substantive relation between the litigants was not under the review of the recognizing court: (2015) E WUHAN ZHONG MIN SHANG WAI CHU ZI No 00026 ((2015)鄂武汉中民商外初字第00026号). Some bilateral treaties explicitly set forth that the court shall not review the merits of the case: see Art 19(2) of the Sino–Vietnam Agreement and Art 18(2) of the Sino–Russia Agreement.

63 See (2014) HU ER ZHONG MIN REN (MACAU) ZI No 1 ((2014)沪二中民认(澳)字第1号); (2016) SU 01 XIE WAI REN No 3 ((2016)苏01协外认3号). The Chinese Mainland–Hong Kong SAR Arrangement 2008 explicitly provides that the scope of enforcement includes interest, lawyer's fee and cost for

(*continued on the next page*)

22 Under Chinese law,[64] compensation or judgments for damages awarded in domestic criminal proceedings are enforceable. There is no authority on whether a foreign judgment involving penal, tax or other public law may be enforced or not, at least in circumstances where no treaty relation exists. The Chinese Mainland–Hong Kong SAR Arrangement 2008[65] and the Chinese Mainland–Hong Kong SAR Arrangement 2017[66] expressly exclude from its scope judgments of taxes and fines. Under some bilateral judicial assistance agreements, a judgment rendered in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party is enforceable in China, such as under the agreements with Laos[67] and Vietnam.[68] This reporter considers that it is reasonable to presume that outside this context, the courts of China will refuse to recognise and enforce foreign judgments involving taxes, fines or penalties.[69]

23 An Uzbekistan judgment which included the collection of a certain sum of taxes was refused enforcement; however, the enforceability of a tax judgment *per se* was not touched on in the discussion.[70]

24 In Chinese legislation, no express rules regarding the enforcement of non-monetary judgments exist, except on the recognition of divorce judgments, judgments involving personal status such as parenthood and

litigation: Art 16. The Chinese Mainland–Hong Kong SAR Arrangement 2017 has a similar provision: Art 14.

64 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 224.

65 Article 16.

66 Article 14.

67 Sino–Laos Agreement, Art 20.

68 Sino–Vietnam Agreement, Art 15.

69 This view is also consistent with international practice for a long time. Taxes, fines, and monetary penal judgments serve to raise revenue for public purposes, and they are considered in most countries to be matters of public law and therefore outside the scope of recognition and enforcement of judgments in private civil suits. See Ronald A Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2013) 74 *University of Pittsburgh Law Review* 491 at 508; see also Sun Jin, *On the Recognition and Enforcement of Foreign Judgments in the United States* (Chinese People's Public Security University Press, 2003) at p 230.

70 (2011) MIN SI TA ZI No 18 ((2011)民四他字第18号).

legitimation[71] and bankruptcy judgments. It remains doubtful whether the courts of China will recognise and enforce other types of foreign non-monetary judgments. In judicial practice, it seems that some courts take a more open attitude. By way of example, non-monetary foreign judgments regarding bankruptcy administration have been recognised by local courts.[72] In the Chinese Mainland–Macau SAR Arrangement, litigants of judgments not ordering monetary payment may apply for recognition alone.[73]

25 Whether provisional measures can be recognised or enforced in China needs further clarification. In the Chinese Mainland–Hong Kong SAR Arrangement 2008, the court addressed may issue orders of asset attachment in support of the recognition and enforcement of a judgment from the court of the contracting party.[74] Certain bilateral treaties entered into by China expressly exclude provisional measures.[75] For example, the Sino–United Arab Emirates Agreement excludes from its scope preservation or provisional measures except those in aid of claims for living expenses.[76]

26 There is no legislation and there appear to be no cases in which a court of China has enforced a non-monetary order such as specific performance. The Chinese Mainland–Hong Kong SAR Arrangement 2008 explicitly provides that only monetary judgments may be recognised and enforced under the Arrangement.[77]

27 With regard to injunctions, the recognition of a Korean court's injunction against payment was denied on the ground that it was a

71 Chinese Mainland–Hong Kong SAR Arrangement 2017, Art 3.

72 A French bankruptcy judgment and a German bankruptcy judgment were recognised by local courts: (2005) HUI ZHONG FA MIN CHU ZI No 145 ((2005)穗中法民三初字第146号民事裁定); (2012) E WUHAN ZHONG MIN SHANG WAI CHU ZI No 00016 ((2012)鄂武汉中民商外初字第00016号).

73 Chinese Mainland–Macau SAR Arrangement, Art 3.

74 Chinese Mainland–Hong Kong SAR Arrangement 2008, Art 14.

75 In relation to the countries covered in this report, the Sino–Laos and Sino–Vietnam Agreements do not contain an express exclusion of provisional matters.

76 Sino–United Arab Emirates Agreement, Art 17(3).

77 Chinese Mainland–Hong Kong SAR Arrangement 2008, Art 1.

provisional one.[78] Another Chinese decision shows that the Chinese court assumed jurisdiction over the dispute instead of deciding the enforceability of an anti-suit injunction from an English court.[79] The prevailing view appears to be that decisions in foreign preliminary or provisional proceedings are not enforceable as they are not final and conclusive. However, this issue has not been touched on by the Supreme People's Court.

28 It remains untouched whether the courts of China will enforce foreign asset-freezing orders. If the order seeking enforcement is granted on an *ex parte* basis, it would be difficult for Chinese courts to enforce it in support of a foreign action.

vi *Fraud*

29 As mentioned above, there is no provision regarding the recognition and enforcement of a judgment obtained by fraud in the legislation, bilateral agreements or conventions which China has concluded, aside from three articles in the Chinese Mainland–Hong Kong SAR Arrangements and the 1969 Convention. Also, there is no reported case. A refusal of such a judgment may be established via application of public policy. It would be reasonable that fraud as a defence should generally be limited to instances of extrinsic fraud, as under Chinese law the court would not retry the merits of the underlying case.

vii *Due process*

30 The SPC Judicial Interpretation explicitly stipulates due process as a requirement for the recognition and enforcement of foreign judgments.[80] As mentioned above, all the bilateral judicial assistance agreements unanimously and explicitly set forth the due process requirement. It has been accepted that under the principle of reciprocity, the lack of due process is an important defence to refuse recognition and

78 (2010) ZHE SHANG WAI ZHONG ZI No 15 ((2010)浙商外终字第15号).

79 (2015) E MIN SI ZHONG ZI No 00194 ((2015)鄂民四终字第00194号).

80 SPC Judicial Interpretation, Art 543.

enforcement. In judicial practice, it is often successfully invoked as a defence. Under the SPC Judicial Interpretation, the fact that the default party has not been duly served will be considered as a lack of or breach of due process. A Canadian divorce judgment was refused recognition on the ground that the applicant did not provide evidence to prove that the respondent had been properly served.[81]

31 As to which law is applicable to determine the existence of such breaches, the Chinese courts may adopt the approach laid down in most bilateral agreements, namely, the law of the rendering state applies. However, in judicial practice, the Chinese courts tend to apply Chinese law.[82]

viii Res judicata

32 Courts of China will refuse to recognise and enforce a foreign judgment conflicting with a judgment involving the same cause of action between the same parties rendered by the courts of China.[83] The SPC Judicial Interpretation does not refer to the conflicts of two foreign judgments. This reporter considers that it would be reasonable to presume that if there are two conflicting foreign judgments, the court of China will determine that the judgment rendered earlier prevails as long as it meets the requirements for recognition.

81 (2011) NAN SHI MIN SAN TE ZI No 1 ((2011)南市民三特字第1号); a Korean divorce judgment was refused on the ground of lack of proper service: (2014) WANG MIN YI CHU ZI No 00038 ((2014)望民一初字第00038号).

82 (2010) MIN SI TA ZI No 81 ((2010)民四他字第81号).

83 SPC Judicial Interpretation, Art 533. See also (2012) MIN SI TA ZI No 3 ((2012)民四他字第3号); an earlier Chinese court judgment dismissed the claim of divorce, and the later foreign divorce judgment was refused on the ground that it was in conflict with the earlier Chinese judgment: (2016) SU WAI XIE REN No 2 ((2016)苏07协外认2号).

ix *Breach of agreement*

33 Under Chinese law, the courts of China will respect a choice of court agreement under certain preconditions.[84] However, if the choice of court agreement is void in accordance with Chinese law,[85] the assumption of jurisdiction of the foreign court is in conformity with its own law and it does not infringe the exclusive jurisdiction of the Chinese courts, the courts of China may not refuse to recognise and enforce it on the ground of breach of such an agreement.

34 China signed the Hague Convention of 30 June 2005 on Choice of Court Agreements on 12 September 2017. China still needs to ratify the Convention before it enters into force in China. It appears likely that China will ratify the Convention as soon as possible. Once China ratifies the Convention, it would be helpful to the recognition of foreign judgments in China and Chinese judgments internationally.

84 According to Art 34 of the Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) ("CPL"), the parties to a contractual dispute or any other property dispute may agree in writing to be subject to the jurisdiction of the people's court at the place having connection with the dispute, such as where the defendant is domiciled, where the contract is performed, where the contract is signed, where the plaintiff is domiciled or where the subject matter is located, *etc*, provided that such an agreement does not violate the provisions of the CPL regarding court-level jurisdictions and exclusive jurisdictions. First, only the parties to contractual disputes or any other property disputes are entitled to make a choice of court agreement. Second, the choice must be in writing. Third, the court chosen by the parties must have a factual connection with the dispute. Fourth, the choice is not contrary to rules on court-level jurisdiction and exclusive jurisdiction.

85 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 34. In judicial practice, the court will apply the law of the forum to determine the validity of the agreement of choice of court: (2013) MIN TI ZI No 243 ((2013)民提字第243)); (2014) LU MIN XIA ZHONG ZI No 158 ((2014)鲁民辖终字第158号); (2014) JIN HAI FA SHANG CHU ZI No 81-1 ((2014)津海法商初字第81-1号).

x *Public policy*

35 Courts of China must refuse to recognise and enforce a foreign judgment if the foreign judgment is contrary to the public policy of China. Under Chinese law, public policy refers to matters relating to state sovereignty and security, basic principles of law[86] and public social interests. Public policy is assessed against the foreign judgment itself not against the original cause of action.[87]

36 The mere fact that Chinese law lacks an analogous cause of action to that underlying the initial judgment will not necessarily render the judgment void against Chinese public policy.[88] Public policy as a defence is seldom invoked to refuse recognition and enforcement of foreign judgments.

xi In rem *judgments*

37 Chinese law does not differentiate between judgments *in rem* or *in personam*. The grounds for non-recognition of foreign judgments in rem should be identical to those of judgments *in personam*. In a case seeking the transfer of property on the basis of a judgment of the

86 An Italian court judgment regarding the dissolution of marriage was recognised but the part of the judgment which dealt with the division of marital property and child maintenance was not recognised for being contrary to the basic principle of Chinese marriage law: (2010) ZHE WEN MIN QUE ZI No 1 ((2010) 浙温民确字第1号).

87 (2016) ZUI GAO FA MIN ZHONG No 152 ((2016)最高法民终152号). In a Supreme People's Court judgment involving a choice of law issue (not a judgment for recognition and enforcement of foreign judgment), the court held that even if the debt in dispute was in the nature a gambling debt, the law of Macau which was the law of the place of the casino and the law which had the closest relation with the gambling debt should be applied, provided the parties had not made a choice of law. The judgment shows the tendency to apply Macau law to give effect to a gambling contract which is invalid and void in Chinese Mainland.

88 See *Private International Law* (Han Depei ed) (Higher Education Press & Beijing University Press, 3rd Ed, 2014) at p 541; Yongping Xiao & Zhengxin Huo, "Order Public in China's Private International Law" (2005) 53 Am J Comp L 653 at 660 and Ma Yongmei, "Public Orders in the Recognition and Enforcement of Foreign Judgments" (2010) 5 *Tribune of Political Science and Law* 62 at 66.

Massachusetts state court, the Chinese courts held that a foreign judgment could not be invoked directly as a basis for the registration of the transfer of property in China, supposing that it has not been recognised in China, for a foreign judgment is not entitled to have effect automatically. It seems to imply that if the judgment could have been recognised in China, it may form the basis for the registration of a transfer of property.[89] However, as recognition of the judgment is involved, the competent jurisdiction of the rendering court over the immovable may be challenged in the Chinese court, for under Chinese law, the courts of China have exclusive jurisdiction over immovables located in the jurisdiction.[90] Therefore, the judgment may probably be refused recognition on the ground of lack of competent jurisdiction.

xii *Limitation period*

38 Under Chinese law, the recognition and enforcement of a foreign judgment would be denied if the limitation period of two years for applying for the enforcement of a foreign judgment has expired.[91]

89 (2014) SHEN ZHONG FA XING ZHONG ZI No 65 ((2014)深中法行终字第65号); (2015) YUE GAO FA XING SHEN ZI No 75 ((2015)粤高法行申字第75号). The Chinese Mainland–Hong Kong SAR Arrangement 2017 expressly provides that judgments involving property relations in relevant matrimonial and family cases may be recognised and enforced: Art 3.

90 Civil Procedure Law of the People's Republic of China (issued 9 April 1991; amended 31 August 2012; enacted 1 January 2013) Art 33.

91 SPC Judicial Interpretation, Art 547; (2013) ZHE YONG MIN QUE ZI No 1 ((2013)浙甬民确字第1号).

Country Report
INDIA

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1 Under Indian law, the execution of judgments and decrees[1] is governed by the provisions of the Code of Civil Procedure, 1908[2] ("CPC"). A foreign judgment or decree may be enforced by filing an execution petition under section 44A of the CPC, or by filing a suit upon the foreign judgment or decree.

2 The procedure under section 44A only applies in respect of judgments or decrees of "superior courts" of "reciprocating territories" which have been notified as such in the Official Gazette by the Central Government. For the purposes of this report, the section 44A procedure is applicable to judgments or decrees of the superior courts of Malaysia and Singapore.[3] If a decree or judgment of any superior court of a reciprocating territory is filed in the Indian District Court, the decree may be executed in India as if it had been passed by the District Court.

3 If the judgment or decree does not pertain to a superior court of a reciprocating territory, as notified by the Central Government, the judgment or decree is not directly executable in India and a fresh suit (civil action) will have to be filed in a court of competent jurisdiction in

1 Under Indian law, the decree is the operating part of the judgment and follows the judgment.

2 Act No 5 of 1908.

3 The s 44A procedure also applies to judgments of superior courts of Aden, Bangladesh, Canada, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Fiji, Hong Kong, New Zealand, Papua New Guinea, Trinidad & Tobago, the United Arab Emirates and the UK.

India on the basis of such decree or judgment. In the fresh suit, the said judgment or decree will be treated as another piece of evidence.[4]

4 In respect of both the procedures mentioned above, the foreign decree or judgment must pass the test for conclusiveness (*ie*, be conclusive as to any matter adjudicated by it) laid down in section 13 of the CPC. Section 13 of the CPC specifies certain exceptions which, if applicable, render the foreign decree or judgment inconclusive and thereby non-executable or unenforceable in India.

5 The well-settled principle of law in India with respect to foreign decrees and judgments is that "it is not open to the court trying the suit on a foreign judgment to decide whether the decision of the foreign court on the materials put before it is right or not".[5] While adjudicating the suit on a foreign decree or judgment, the duty of the court is "merely" to see that the foreign court has applied its mind to the facts of the case and the law on the point.[6] In other words, the courts of India do not examine the substantive merits of the foreign court's decree or judgment.

6 The decree or judgment of a foreign court is enforced on the principle that where a court of competent jurisdiction has adjudicated upon a claim, a legal obligation arises to satisfy the same.[7] The rules of private international law of each State differ in the very nature of things, but by the comity of nations,[8] certain rules are recognised as common to civilised jurisdictions. Through part of the judicial system of each State these common rules have been adopted to adjudicate upon disputes involving a foreign element and to effectuate judgments of foreign courts in certain matters, or as a result of international conventions.

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4 *Maloji Nar Singh Rao v Shankar Saran* AIR 1962 SC 1737 at 1748, [14]. Also see *I&G Investment Trust v Raja of Khalikote* AIR 1952 Cal 508 at 523, [38].

5 *M/s Formosa Plastics Corp, USA v Ashok K Chauhan* (8 October 1998) (Delhi High Court) at para 27.

6 *M/s Formosa Plastics Corp, USA v Ashok K Chauhan* (8 October 1998) (Delhi High Court) at para 27.

7 *Goyal Mg Gases Pte Ltd v Messer Griesheim Gmbh* (1 July 2014) (Delhi High Court).

8 *M/s Alcon Electronics Pvt Ltd v Celem SA of Fos 34320 Roujan, France* [2016] INSC 861 (9 December 2016) (Supreme Court of India).

7 The courts in India are generally guided by the same principles as those adopted by the courts in England in matters relating to foreign judgments.[9] As in England, the foreign judgment must be final and conclusive in the court in which it is passed and it may be final although it is subject to appeal to a higher court.[10] With regard to interlocutory orders, the Supreme Court of India stated "[t]he principles of comity of nation demand us to respect the order of English court. Even in regard to an interlocutory order, Indian courts have to give due weight to such order unless it falls under any of the exceptions under section 13 of the CPC".[11]

A REQUIREMENTS UNDER SECTION 13 OF THE CODE OF CIVIL PROCEDURE, 1908

8 Under section 13 of the CPC,

> A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—
>
> (a) where it has not been pronounced by a Court of competent jurisdiction;
>
> (b) where it has not been given on the merits of the case;
>
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of India in cases in which such law is applicable;
>
> (d) where the proceedings in which judgment was obtained are opposed to natural justice;
>
> (e) where it has been obtained by fraud;
>
> (f) where it sustains a claim founded on a breach of any law in force in India.

9 *Duggamma v Ganeshayya* AIR 1965 Mys 97.

10 *Baijnath v Vallabhadas* AIR 1933 Mad 511.

11 *M/s Alcon Electronics Pvt Ltd v Celem SA of Fos 34320 Roujan, France* [2016] INSC 861 at [18] (9 December 2016) (Supreme Court of India).

i *Court of competent jurisdiction*

9 Jurisdiction is to be determined by the Indian court before which the foreign decree is brought for recognition and enforcement.

10 Section 14 of the CPC provides that "[t]he Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction".

11 The Orissa High Court in the case of *Padmini Mishra v Ramesh Chandra Mishra*,[12] held that when a party to a proceeding before a court at New York did not make any plea in respect of want of jurisdiction of the court at New York and allowed the matter to proceed *ex parte*, the presumption under section 14 had been met. However, this presumption is rebuttable.

12 In a case for enforcing a decree of the Supreme Court of Singapore, the Madras High Court stated that:[13]

> The circumstances that give jurisdiction are, alternatively: (1) where the defendant is a subject of a foreign country in which a judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued, (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

13 In similar circumstances, the Supreme Court of India[14] while considering "what conditions are necessary for giving jurisdiction to a foreign court before a foreign judgment is regarded as having extra-territorial validity", in a case on an *ex parte* decree of a foreign court for recovery of certain amounts, wherein the defendants did not appear despite service of the writ of summons, relied upon *Halsbury's Laws of*

12 AIR 1991 Ori 263 at 266.

13 *Ramanathan Chettiar v Kalimuthu Pillai* AIR 1914 Mad 556 at [3].

14 *Maloji Nar Singh Rao v Shankar Saran* AIR 1962 SC 1737.

England[15] to hold that none of those conditions (similar to those listed in the previous reference) had been satisfied.

14 The Supreme Court of India further relied upon a Privy Council decision, where it was held that:[16]

> In a personal action to which none of these causes of jurisdiction previously discussed apply, a decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity, by the Courts or every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced.

15 The following are cases in which the courts in India have held that a foreign court did not have jurisdiction and hence its judgment or decree was unenforceable:

(a) That a decree passed *in absentem* was a total nullity as a foreign judgment, in other words, it is not a valid foreign judgment, the execution of which could be levied in courts situated in a foreign territory.[17]

(b) Where the suit is validly instituted, but during the pendency of the suit one of the defendants expires and his non-resident foreign legal representatives are brought on record, the court held that the material time when the test of the rule of private international law is to be applied is the time at which the suit was instituted. Therefore, it was held that the legal representatives, although foreigners, were bound by the decree and section 13(a) could not help them in any way.[18]

(c) Where the defendants were carrying on business in a partnership in Singapore on the date of the action, and the suit related to certain dealings with the firm, and an *ex parte* decree had been passed against them, the court held that the mere fact of entering into a contract in the foreign country, does not lead to the

15 Vol III (3rd Ed) at p 144, para 257.

16 *Sirdar Gurdial Singh v Maharaja of Faridkot* XXII ILR Calcutta 222 at 238.

17 *Kukadap Krishna Murthy v Godmatla Venkata Rao* AIR 1962 AP 400.

18 *Andhra Bank Ltd v R Srinivasan* AIR 1962 SC 232.

inference that the defendant had agreed in an individual capacity, to be bound by the decisions of the courts of that country. Therefore, it was held that the decree was passed against the defendants without any jurisdiction.[19]

(d) The mere fact that a contract was made in a foreign country does not clothe the foreign court with jurisdiction in an action *in personam*. Further it was held that a person cannot be held to have submitted to the jurisdiction of a foreign court if his attempt to get the *ex parte* judgment set aside fails. It was held that the submission to the jurisdiction of a foreign court has to be before the foreign decree is passed.[20]

(e) In an action initiated in England against an Indian subject (respondent) on the basis of a contract which was governed by English law, it was held that since only the payments were governed by English law, a willingness to submit to the English jurisdiction could not be shown.[21] The court in India observed, *obiter dictum*, that even though the contract is governed by English law, it could not be assumed to give jurisdiction in the international sense, although it may give rise to a cause of action.[22]

(f) If a party has once appeared before a foreign court in the character of the plaintiff, it does not mean that he is forever afterwards to be regarded as having submitted to the jurisdiction of the foreign court in any subsequent action, by any person or upon any cause of action, which may be brought against him.[23]

(g) The mere fact that the transaction on which the suit had been instituted in the foreign court, was effected during the time the defendant's agent, holding a power of attorney of the defendant, which had expired on the date of institution of the suit, was

19 *R M V Vellachi Achi v R M A Ramanathan Chettiar* AIR 1973 Mad 141. See also *K N Guruswami v Muhammad Khan Sahib* AIR 1933 Mad 113.

20 *Ramkisan Janakilal v Seth Harmukharai Lachminarayan* AIR 1955 Nag 103.

21 *I&G Investment Trust v Raja of Khalikote* AIR 1952 Cal 508.

22 *I&G Investment Trust v Raja of Khalikote* AIR 1952 Cal 508. See also *Moazzin Hossein Khan v Raphael Robinson* ILR 28 Cal 641.

23 *Thirunavakkaru Pandaram v Parasurama Ayyar* AIR 1937 Mad 97.

living in the foreign country, does not amount to submission to the jurisdiction of the foreign court.[24]

16 Thus, where the defendant is not a national of or resident in a foreign country, and has not commenced any action in the form where he is later sued, has not voluntarily appeared or agreed to submit to the forum in any manner, the courts of such foreign state cannot be considered as courts of competent jurisdiction. Conclusion of a contract or carrying on business in a foreign country also does not amount to acceptance, in an individual capacity, of the jurisdiction of the courts of that country.

17 The following are cases in which the courts of India held that a foreign court had jurisdiction:

(a) Filing of an application for leave to defend a summary suit in a foreign court amounted to voluntary submission to its jurisdiction.[25]

(b) If a defendant appears in the court where the suit is instituted and questions the jurisdiction and also challenges the action on merits, he is said to have submitted to the jurisdiction voluntarily.[26] Filing a counterclaim would amount to a submission on the merits and as submission to the jurisdiction of the court.

(c) Mere conduct or circumstances indicative of intention to submit to the jurisdiction is enough to derive a conclusion of submission to jurisdiction. In this case, during the pendency of the suit, the plaintiff effected attachment before judgment of certain property of the defendant and the defendant by a letter acknowledged the attachment and requested merely for a concession, which was not a conditional request, and when the offer was refused and the defendant remained *ex parte* and the suit was decreed, it was

24 *Vithalbhai Shivabhai Patel v Lalbhai Bhimbhai* AIR 1942 Bom 199.

25 *Shalig Ram v Firm Daulatram Kundanmal* AIR 1967 SC 739; *Lalji Ram and Sons v Firm Hansraj Nathuram* AIR 1971 SC 974.

26 *Chormal Balchand Firm v Kasturi Chand* AIR 1938 Cal 511 at 516.

deemed that the defendant had submitted to the jurisdiction of the foreign court.[27]

(d) Where the defendant appeared in the foreign court due to a Commission[28] having been appointed to summon and examine the defendant as a witness, and the defendant pleaded that the court had no jurisdiction to try the suit and objected to the questions put to him in examination and got himself cross examined, it was held that the defendant had submitted to the jurisdiction of the foreign court.[29]

(e) Where the defendant had taken the plea of lack of jurisdiction before the trial court but did not take the plea before the appeal court or in the Special Leave Petition before the Supreme Court of India, it amounted to submission to jurisdiction.[30]

18 Accordingly, if a defendant voluntarily appears before a foreign court and challenges the action on merits or by way of a counterclaim or seeks leave to defend, consents to being examined as a witness, or gives up his challenge to the court's jurisdiction at any stage of the proceedings, he may be considered as having submitted to the court's jurisdiction.

ii *Judgment not on merits of the case*

19 In *Mallappa Yellappa Bennur v Raghavendra Shamrao Deshpande*,[31] the court in India held that although the court does not go into the merits of the case decided in the foreign court, however, due to section 13(b) of the CPC, the courts in India have a right to examine the judgment to see whether it has been given on the merits.

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27 *Oomer Hajee Ayoob Sait v Thirunavukkarasu Pandaram* AIR 1936 Mad 552.

28 Courts in India can issue Commissions to another court in India, or to an individual for various purposes such as taking of evidence, making an investigation, examining accounts or making a partition of property. Commissions to a court in another country are issued through "letters of request".

29 *V Subramania Aiyar v Annasami Iyer* AIR 1948 Mad 203.

30 *British India Steam Navigation Co Ltd v Shanmughavilas Cashew Industries Ltd* (1990) 3 SCC 481 at 495.

31 AIR 1938 Bom 173 at 177.

20 In the case of *R M V Vellachi Achi v R M A Ramanathan Chettiar*,[32] the Madras High Court held that if the foreign judgment is not based upon the merits, whatever the procedure might be in the foreign country in passing judgments, those judgments will not be conclusive. The court also held that the burden of proof for showing that the execution/enforceability of the judgment or decree was excepted due to the operation of section 13 is upon the person resisting the execution.

21 In the following cases, the courts in India held that the decrees or judgments were not passed on the merits of the case and hence were inconclusive:

(a) A suit for money was brought in the English courts against the defendant as partner of a certain firm. He denied that he was a partner and also that any money was due. On his omission to answer certain interrogatories, his defence was struck off and judgment entered for the plaintiff. When the judgment was sought to be enforced in India, the defendant raised the objection that the judgment had not been rendered on the merits of the case and hence was not conclusive under the meaning of section 13(b) of the CPC. The Privy Council held that since his defence was struck down and it was treated as if the defendant had not defended the claim and the claim of the plaintiff was not investigated into, the decision was not conclusive in the meaning of section 13(b) and therefore, could not be enforced in India.[33]

(b) An *ex parte* judgment and decree which did not show that the plaintiff had led evidence to prove his claim before the court, was not executable under section 13(b) of the CPC since it was not passed on the merits of the claim.[34]

(c) A decree passed by a Singapore court after refusing the leave to defend sought for by the defendant was not a conclusive judgment within the meaning of section 13(b) of the CPC.[35]

(d) A judgment and decree given by default under a summary procedure contemplated by Order 14 of the UK Supreme Court

32 AIR 1973 Mad 141 at 145, [31].

33 *D T Keymer v P Viswanatham* AIR 1916 PC 121.

34 *Gurdas Mann v Mohinder Singh Brar* AIR 1993 P&H 92.

35 *K M Abdul Jabbar v Indo Singapore Traders P Ltd* AIR 1981 Mad 118.

Rules 2009,[36] in the absence of appearance by the defendant and filing of any defence by him, and without any consideration of the plaintiff's evidence is not a judgment given on the merits of the case and hence is not conclusive within the meaning of section 13(b) of the CPC. Therefore, the decree is not executable in India.[37]

(e) Even though a decree in a foreign court was passed *ex parte*, it will be binding if evidence was taken and the decision was given on a consideration of the evidence. In this case the defendant was ordered to pay a part of the suit claim as a security for the purpose of defending the claim. The defendant failed to make payment of the security and on that basis the court passed the decree against the defendant. The court on the above principle held that the judgment and decree was not enforceable in India under section 13 of the CPC.[38]

(f) The Supreme Court of India while interpreting section 13(b) of the CPC held that the decision should be a result of the contest between the parties, and that a mere filing of the reply to the claim under protest without submitting to the jurisdiction of the court, or an appearance in the court either in person or through a representative for objecting to the jurisdiction of the court, should not be considered as a decision on the merits of the case.[39]

(g) Where the defendant entered appearance, and filed his written statement in the foreign court, but was absent on the day of the hearing, the court passed a decree without hearing any evidence. The Madras High Court held that the decree was not passed on the merits of the case and hence inconclusive within the meaning of section 13(b) of the CPC.[40]

(h) A decision on the merits involves the application of the mind of the court to the truth or falsity of the plaintiff's case and, therefore, though a judgment passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even

36 SI 2009 No 1603.

37 *Middle East Bank Ltd v Rajendra Singh Sethia* AIR 1991 Cal 335.

38 *M K Sivagaminatha Pillai v K Nataraja Pillai* AIR 1961 Mad 385 388.

39 *Y Narsimha Rao v Y Venkata Lakshmi* (1991) 3 SCC 451.

40 *B Nemichand Sowcar v Y V Rao* AIR 1946 Mad 448.

> though passed *ex parte*, a decision passed without evidence of any kind and merely on the pleadings cannot be held to be a decision on the merits.[41]

22 Thus, judgments given in summary procedures, in the absence of appearance of the defendant, or where the defendant is refused the right to defend, and judgment is given without consideration of the plaintiff's evidence, are not accepted as judgments given on the merits of the case, and cannot be enforced in India.

23 The following are some cases in which the courts in India held that the decrees or judgments were passed on the merits of the case.

(a) Where no defence is raised and only an adjournment is sought, and the request for adjournment is refused and the judgment is given on the evidence presented by the plaintiff, it cannot be said that the judgment is not on the merits.[42]

(b) The Bombay High Court has held that the true test for determining whether a decree is passed on the merits of the claim or not is whether the judgment has been given on a proper consideration of the plaintiff's case or as a penalty for any conduct of the defendant. Since the claim of the plaintiff was investigated, although the defendant was considered to be *ex parte*, the objection under section 13(b) was held to be unsustainable.[43]

(c) The defendant had entered appearance in the foreign court and filed his written statement. However, on the appointed day for the hearing, his advocate withdrew from the suit for want of instructions and also the defendant did not appear and was placed *ex parte*. The foreign court heard the plaintiff on merits and passed the decree in his favour. It was held that the foreign decree and the judgment were passed on the merits of the claim.[44]

41 *A N Abdul Rahman v J M Mahomed Ali Rowther* AIR 1928 Rangoon 319.

42 *Ephrayim H Ephrayim v Turner Morrison & Co* AIR 1930 Bom 511 at 515.

43 *Gajanan Sheshadri Pandharpurkar v Shantabai* AIR 1939 Bom 374.

44 *Trilochan Choudhury v Dayanidhi Patra* AIR 1961 Ori 158.

(d) The defendant had given a letter of consent to the plaintiff that the decree may be passed against him for the suit claim. The court in India held that since the defendant had agreed to the passing of the decree against him, the judgment could not be said to be not on the merits of the claim.[45]

(e) The fact that one of the issues had not been dealt with, would not by itself justify a finding that the decision was not upon the merits.[46]

(f) Where the foreign court had taken evidence and examined witnesses and after taking all the oral evidence and considering the same together with the documents had decreed the claim, the decision must be treated as given on merits and the fact that the defendant did not appear cannot make it otherwise.[47]

(g) Though the judgment and decree of a foreign court might have been passed *ex parte*, if it was passed on a consideration of the evidence adduced in the case, the decision must be deemed to have been on the merits.[48]

24 Even where judgment was given *ex parte*, if the foreign court had investigated the claim of the plaintiff, and had taken into consideration the evidence presented by him, and examined witnesses before giving its judgment, it would be considered as a decision on merits.

iii *Applicable law*

25 Where a foreign court in a probate proceeding refused to recognise the law of British India, applicable to the deceased's immovable property in British India, the judgment was held to be unenforceable.[49]

45 *Mohammad Abdulla v P M Abdul Rahim* AIR 1985 Mad 379 at 382 and 383.

46 *Wazir Sahu v Munshi Das* AIR 1941 Pat 109 at 112.

47 *Vithalbhai Shivabhai Patel v Lalbhai Bhimbhai* AIR 1942 Bom 199 at 202.

48 *S Jayam Sunder Rajaratnam v K Muthuswami Kangani* AIR 1958 Mad 203. This decision was followed in the case of *M K Sivagaminatha Pillai v Nataraja Pillai* AIR 1961 Mad 385.

49 *Panchpakesa Iyer v K N Husain* AIR 1934 Mad 145.

26 The decision of a foreign court on title to immovable property within its jurisdiction will be conclusive between the parties in India provided it is a decision of a competent court[50] and does not suffer from any of the infirmities mentioned in section 13 of the CPC. However, it would not be effective in respect of property situate outside its jurisdiction, even though title to properties in both the suits is founded on an identical cause of action, since succession is governed by *lex situs* in case of immovable properties and, therefore, title must be adjudicated upon by the court of the country where such property is situated.[51]

iv *Natural justice*

27 The Supreme Court of India has held that "[i]t is a well-established principle of private international law that if a foreign judgment was obtained by fraud or if the proceedings in which it was obtained were opposed to natural justice, it will not operate as *res judicata*".[52]

28 The expression "contrary to natural justice" relates to the alleged irregularities of procedure adopted by the adjudicating court and is not concerned with the merits of the case. A foreign decree or judgment can be set aside only on one of the grounds in section 13 of the CPC and these do not include that it proceeds on an erroneous view of the evidence or of law. The mere fact that a foreign decree or judgment is wrong in law does not make it one opposed to natural justice. There must be something in the procedure anterior to the decree or judgment which is repugnant to natural justice. In other words, the courts are vigilant in ensuring that the defendant has not been deprived of an opportunity to present his side of the case.[53] Thus, for example, a foreign judgment without notice of suit to the defendant is contrary to natural justice and is not enforceable in an Indian court.

29 Where the defendant was given sufficient opportunities both by the Hong Kong courts, as well as by the Indian courts, to ensure that he had

50 See paras 9–18 above.
51 *Duggamma v Ganeshayya* AIR 1965 Kant 97.
52 *Lalji Raja & Sons v Firm Hansraj Nathuram* AIR 1974 SC 1764 at 1768.
53 *Sankaran Govindam v Lakshmi Bharathi* AIR 1974 SC 1764.

adequate opportunity to defend the case, but did not make proper use of such opportunities, the Indian courts held that it cannot be said that the principles of natural justice have been violated in any manner or that the proceedings in which the foreign judgment have been obtained are opposed to the principles of natural justice.[54]

v *Fraud*

30 All decrees or judgments whether domestic or foreign are void if obtained by fraud, whether extrinsic or intrinsic in nature. Accordingly, a foreign decree procured by fraud bearing on jurisdictional facts (*ie*, extrinsic fraud) would not be recognised under section 13 of the CPC as being contrary to public policy and as offending against notions of substantial justice.[55]

31 In respect of intrinsic fraud, the Supreme Court of India has held that "It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and *non est* in the eyes of law".[56] The court further stated "[a] litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party".[57]

vi *Breach of any law in India*

32 A claim sustained in a foreign judgment founded on a breach of any law in force in India makes the judgment inconclusive and thereby inapplicable in India.

54 *ABN v Satish Dayalal Choksi* AIR 1990 Bom 170.
55 *Satya v Teja* AIR 1975 SC 105.
56 *S P Chengalvaraya Naidu v Jagannath* AIR 1994 SC 853 at [1].
57 *S P Chengalvaraya Naidu v Jagannath* AIR 1994 SC 853 at [6].

33 Under the Foreign Exchange Regulation Act, 1973,[58] a suit could be brought in India for the enforcement of a foreign judgment on a guarantee for which the permission of the Reserve Bank/Central Government would have been required. Such legal proceedings are specifically permitted under the Act. Such proceedings abroad cannot be said to violate of any law in India. However, before a foreign decree based on such a guarantee can be executed in India, the permission of the Reserve Bank/Central Government is necessary.[59]

B MONEY DECREES

34 The decree or judgment executable under section 44A of the CPC could be a decree or judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty or a sum payable under an award in an arbitral proceeding.[60] As stated by the Calcutta High Court, "[i]n a sense it should be a pure and simple money decree or judgment by a civil court. It is therefore clear that any and every decree or judgment passed by a superior court of a reciprocating territory cannot be executed through a competent District Court in India".[61]

35 The doctrine of severability is well settled in Indian courts, whereby if part of a judgment or order is invalid or unenforceable for any reason, the remaining part which is not affected by the invalidity can be enforced provided the two parts are not so intertwined as to be inseparable. The Supreme Court of India has observed that the proper test for deciding validity or otherwise of an order or agreement is "substantial severability" and not "textual divisibility". It has further held that it is the duty of the court to sever and separate trivial and technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable.[62]

58 Act No 46 of 1973.
59 *ABN v Satish Dayalal Choksi* AIR 1990 Bom 170.
60 Code of Civil Procedure, 1908 (Act V of 1908) s 44A, Explanation 2.
61 *Radhamani India Ltd v Imperial Garments Ltd* AIR 2005 Cal 47 at [6].
62 *Shin Satellite Public Co Ltd v Jain Studios Ltd* (2006) 2 SCC 628.

36 Accordingly, on this basis, where a foreign judgment contains any part which is unenforceable, the remaining part could be enforced, if it satisfies all the conditions stipulated in section 13(1) of the CPC, and is separable from that part which is unenforceable.

37 In a suit for enforcement of a money decree from a Texas court, a temporary injunction restraining the defendants from transferring movable and immovable property was sought. The Bombay High Court held that no material had been placed on record "to show that in case the defendants are not prevented from transferring their property, plaintiffs would not be able to execute the money decree that they may get at the final disposal or that the defendants are transferring the property with an intention to defeat the money decree that may be passed".[63]

38 Where a foreign court awarded costs with interest in an interlocutory order, the Supreme Court of India held that the order passed by the foreign court is conclusive in that respect and on merits. It stated that the costs having been quantified have assumed the character of a money decree for costs and cannot be equated, either with a fine or penalty which is imposed on a party by the court or taxes claimed or taxes payable to a local authority, government, or other charges of a like nature. It further stated that although interest on costs is not provided for in the CPC, Indian courts are very much entitled to address the issue for execution of the interest amount and the right to 8% interest as per the UK Judgments Act 1838[64] can be recognised and implemented in India.[65]

39 For the avoidance of doubt, it should be noted that non-monetary judgments, such as declaratory orders, or orders of specific performance and injunctions, and foreign asset freezing orders[66] can also be recognised and enforced under section 44A of the CPC.

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63 *Swan Mills Ltd v Dhirajlal* (2 February 2012) (Bombay High Court) at para 6.

64 c 110.

65 *M/s Alcon Electronics Pvt Ltd v Celem SA of Fos 34320 Roujan, France* [2016] INSC 861 (9 December 2016) (Supreme Court of India).

66 In the context of its own power to make interlocutory orders before judgment, the Supreme Court referred with approval to Mareva injunctions, citing extensively from judgments of Australian and New Zealand courts: *MVAL Quamar v Tsavliris Salvage* AIR 2000 SC 2826.

C *IN REM* JUDGMENTS

40 Section 41 of the Indian Evidence Act, 1872,[67] incorporates the law in respect of judgments in rem, without using that expression. A final judgment, order or decree of a competent court in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character is relevant when the existence of any such thing is relevant. Such judgments are conclusive of matters actually decided upon between the parties to the suit or their privies.[68]

41 In the case *Duggamma v Ganeshayya*,[69] the Karnataka High Court stated that "[n]o foreign judgment affecting to adjudicate on the title to English realty would receive recognition in an English court … this is also the law laid down by the Supreme Court of India in *Viswanathan*'s case".[70]

D CHOICE OF COURT AGREEMENTS

42 Indian law does not have any express provision regarding choice of law or forum selection by parties through contract. India is also not party to the Hague Convention of 30 June 2005 on Choice of Court Agreements. Further, under Indian law, an agreement which absolutely

67 Act I of 1872.

68 AIR 2000 SC 2826. In *M V Elisabeth v Harwan Investment and Trading Pvt Ltd* 1992 (1) SCR 1003 at [48], the court stated that:

> A plaintiff seeking to enforce his maritime claim against a foreign ship has no effective remedy once it has sailed away and if the foreign owner has neither property nor residence within jurisdiction. The plaintiff may therefore detain the ship by obtaining an order of attachment whenever it is feared that the ship is likely to slip out of jurisdiction, thus leaving the plaintiff without any security.

69 AIR 1965 Kant 97.

70 *Viswanathan v Rukn-ul-Malik Syed Abdul Wajid* AIR 1963 SC 1, cited in *Duggamma v Ganeshayya* AIR 1965 Kant 97 at [14]. In that case, it was held that, since succession is governed by *lex situs* in the case of immovable properties, therefore, title must be adjudicated upon by the court of the country where such property is situated.

restricts any party from enforcing its rights by recourse to legal proceedings in the ordinary tribunals is void.[71]

43 However, if two or more courts have jurisdiction over the subject-matter, an agreement by the parties that the disputes between them will be subject to one of such courts is valid for the reason that it does not amount to an absolute ouster of jurisdiction of all courts, and further would not be contrary to either public policy or the provisions of section 28 of the Contract Act, 1872.[72]

44 In a case where the parties had agreed that "[t]he Agreement shall be subject to jurisdiction of the courts at Kolkata", and one party approached the Rajasthan High Court, the Supreme Court of India held that the Rajasthan High Court did not have any territorial jurisdiction to entertain the matter.[73]

45 When the ouster clause is clear, unambiguous and specific, accepted notions of contract would bind the parties, and other courts should avoid exercising jurisdiction. The Supreme Court of India observed that even without words such as "alone", "only" and "exclusive" in contractual ouster clauses, the maxim *expressio unius est exclusion alterius* ("expression of one is the exclusion of another") may apply in appropriate cases where a certain jurisdiction is specified in a contract.[74]

46 The parties cannot, by agreement, confer jurisdiction on a court which does not have any jurisdiction over the subject-matter.[75] Moreover, in order to select one out of two courts by an agreement, both the courts

71 Indian Contract Act, 1872 (Act 9 of 1872) s 28.

72 *ABC Laminart Pvt Ltd v A P Agencies, Salem* AIR 1989 SC 1239; *Globe Transport Corp v Triveni Engineering Works* 1983 (4) SCC 707; *Hakam Singh v Gammon India Ltd* AIR 1971 SC 740; *A V M Sales Corp v Anuradha Chemicals Pte Ltd* (2012) 2 SCC 315.

73 *Swastik Gases Pte Ltd v Indian Oil Corp Ltd* (2013) 9 SCC 32.

74 *Hakem Chand v Gammon (India) Ltd* (1971) 1 SCC 286; *Insulations v Davy Ashmore India Ltd* (1995) 4 SCC 153.

75 *Patel Roadways v Prasad Trading Co* AIR 1992 SC 1514.

must have jurisdiction, and the agreement should be clear and unambiguous as regards the forum selection clause.[76]

E CONFLICTING JUDGMENTS

47 The CPC contains provisions with a view to limiting the multiplicity of litigation on the same issues between the same parties. However, the pendency of a suit in a foreign court does not preclude the courts in India from trying a suit founded on the same cause of action.

48 Section 11 of CPC provides for the rule of *res judicata* whereby courts are barred from trying "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, …, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".[77]

49 Under section 13 of the CPC, a foreign judgment, provided it is not affected by any of the exceptions provided therein, "shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or …".

50 The Supreme Court of India has observed that:[78]

> The object and purport of principle of *res judicata* as contained in section 11 of the CPC is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of *lis* stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute book with a view to bring the litigation to an end so that the other side may not be put to harassment.

76 *Hanil Era Textiles Ltd v Puromatic Filters* (P) Ltd (2004) 4 SCC 671.

77 See also s 10 of the Code of Civil Procedure, 1908 (Act No 5 of 1908).

78 *Swamy Atmananda v Sri Ramakrishna Tapovanam* (2005) 10 SCC 51 at [31].

51 In another case, the Supreme Court of India elaborated on the principles of *res judicata* as follows:[79]

> The principles of *res judicata* are of universal application as they are based on two age-old principles, namely, … that it is in the interest of the State that there should be an end to litigation and the other principle is … that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. This doctrine of *res judicata* is common to all civilised system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.

52 It may be noted that under the CPC, the principle of *res judicata* is of wider application as it applies to issues "directly and substantially in issue in a former suit"[80] and also includes "any matter which might and ought to have been made ground of defence or attack in such former suit",[81] while the rule regarding conclusiveness of a foreign judgment only extends "to any matter thereby directly adjudicated upon".[82]

53 The Delhi High Court, while passing an order of temporary injunction restraining the defendant from pursuing a claim before a London court, stated:[83]

> *Prima facie* the initiation of proceedings by the defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of law. It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land. The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions.

79 *M Nagabhushana v State of Karnataka* (2011) 3 SCC 408 at [14].
80 Code of Civil Procedure, 1908 (Act No 5 of 1908) s 11.
81 Code of Civil Procedure, 1908 (Act No 5 of 1908) s 11, Explanation IV.
82 Code of Civil Procedure, 1908 (Act No 5 of 1908) s 13.
83 *Union of India v Videocon Industries Ltd* (5 March 2012) at para 111.

54 From the above, if the question of conflict were to arise between a judgment of an Indian court and a foreign court, it would depend on the facts of the particular case. If the same issues had been in contention and were directly adjudicated upon in both cases, the judgment earlier in time should prevail. In case there is a conflict between two foreign judgments given by courts in different countries, in the first instance, both judgments would have to be examined on the basis of the conditions set out in section 13 of the CPC, and finally, the question of which country the cause of action was more closely related may be relevant.

Country Report
THE REPUBLIC OF INDONESIA

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A INTRODUCTION

1 Indonesian law acknowledges that parties are free to choose a foreign forum for dispute settlement. The rationale of choice of forum in Indonesia is based on the principle of freedom to contract.

2 This report shows that foreign judgments on civil and commercial matters are not automatically enforceable in Indonesia. The reason for non-enforcement is not straightforward. Legal developments in the past have precipitated in a lack of provisions in the positive law[1] specifically dealing with the issue. On that account, the report will start by setting out the context, including, inevitably, a brief explanation on Indonesian law. The report then continues by describing the positive law which consists of legislation promulgated after independence and colonial statutes that continue to operate based on the Transitional Provisions of the Indonesian Constitution.[2] Note that the use of jurisprudence and doctrine as gap-filling law are pivotal in the court treatment of foreign judgments.

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* This reporter wishes to acknowledge the assistance of Priskila P Penasthika and Yvonne K Nafi in the preparation of this report. The following abbreviations have been used in the footnotes: *Staatsblad* [State Gazette of the Dutch East Indies] ("S"); State Gazette of the Republic of Indonesia ("SGRI") and Supplementary State Gazette of the Republic of Indonesia ("SSGRI").

1 See paras 9–11 below.

2 *Ie*, the 1945 Constitution of the Republic of Indonesia. See paras 8–11 below.

B RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN INDONESIA

i *Brief overview of Indonesian law*

3 Indonesian law, and its source, in general is pluralistic. An important reason for this pluralism is the history of Indonesia. During the colonial era, the Dutch East Indies government divided the population into three groups – European, foreign Oriental and indigenous. These groups were subject to different substantive law. Consequently, there were multiple fora for dispute settlement which created a complex judicial system.[3] After Indonesia's independence in 1945, the substantive law of the colonial era was repealed by various acts applicable for the whole country. However, despite the attempt to promulgate national legislation, a substantial part of Indonesian law is of colonial origin. Some of these laws remain intact in their original form, save for the language used – Dutch translated to Indonesian – and some adjustments to reflect the constitutional structure of the Republic of Indonesia. Since Indonesia does not have a code or act on private international law, the positive law, including that of civil procedure, applies both for national as well as international cases.

4 The Judiciary Power Law divides tribunals under the Supreme Court (*Mahkamah Agung*) into four judicature (*peradilan*) – the general judiciary (*peradilan umum*), the religious judiciary (*peradilan agama*), the military judiciary (*peradilan militer*) and the administrative judiciary (*peradilan tata usaha negara*).[4]

5 The general judiciary has general jurisdiction throughout Indonesia for civil and criminal cases. The Judiciary has a three-tier court with the Country Court (*pengadilan negeri*)[5] as the court of first instance, the High Court (*pengadilan tinggi*) as the court of appeal, and the Supreme Court as the court of review (cassation, *kasasi*). In the wake of the Asian

3 See paras 8–35 below.

4 Article 25:1 of the Law No 48/2009 on Judiciary Power (SGRI 2009-157, SSGRI 5076).

5 *Pengadilan negeri* is often translated as district court. This translation may cause confusion because other types of judiciary – religious, military, and administrative courts – are also divided into districts.

monetary crisis, a special court within the purview of the general judiciary was introduced, the commercial court (*pengadilan niaga*).[6] The first commercial court was established at the Central Jakarta Country Court.[7] The commercial court now also has competence to try, as a first instance court, disputes concerning intellectual property rights[8] and liquidation of banks.[9]

ii *Civil and commercial matters*

6 There is no clear-cut distinction between civil and commercial matters in Indonesian law. One of the main reasons for this is the close relationship between the Civil Code and the Commercial Code.[10] When both codes have provisions on the same issue, as it is specialised law, the latter will supersede the former.[11] However, with respect to judgments, Indonesian courts disjoin decisions of a commercial nature from non-commercial civil cases, as evident for instance by the establishment of the commercial court.

7 With regard to the distinction, Indonesia's accession[12] to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") is a milestone. Following Article I(3) of the New York Convention, the Supreme Court ruled that recognition and enforcement would only be extended to foreign arbitral awards

6 Article 280:1 of the Government Regulation in lieu of Law No 1/1998 on the Amendment to Insolvency Law (SGRI 1998-87, SSGRI 3761). The government regulation later became law on the basis of Law No 4/1998 on the Institution of the Government Regulation in lieu of Law No 1/1998 on the Amendment to the Insolvency as Law. This law has been replaced by Law No 37/2004 on Insolvency and Postponement of Debt Repayment (SGRI 2004-131, SSGRI 4443).

7 Article 281:1 of the Government Regulation in lieu of Law No 1/1998.

8 *Eg*, Art 95:2 Law No 28/2014 on Copyrights (SGRI 2014-266, SSGRI 5599).

9 Article 50 of the Law No 24/2004 on Indonesia Deposit Insurance Corporation (SGRI 2004-96, SSGRI 4420) as amended by Law No 7/2009 on the Institution of Government Regulation in lieu of Law No 3/2008 on Amendment to Law No 24/2004 on Indonesia Deposit Insurance Corporation as Law (SGRI 2009-8, SSGRI 4963).

10 S 1847-23 (for both Codes).

11 Commercial Code, Art 1, para 1.

12 Presidential Decree No 34/1981 (SGRI 1981-40).

which, according to Indonesian law, dealt with issues of commercial law (*hukum dagang*).[13] Arbitration Law[14] has a similar provision, although it employs a different term, *ie*, trade law (*hukum perdagangan*).[15] The elucidation to that provision elaborates that the scope of trade law includes *inter alia* commerce, banking, finance, investment, industry and intellectual property.[16] This reporter opines that the same scope as in respect of trade law may be applicable to the issues of recognition and enforcement of judicial decisions.

iii *The court and positive law for civil procedure*

a No codification of civil procedure

8 The positive law for civil procedure is scattered in several statutes. They can be classified as statutes that regulate civil procedure *per se* and judiciary power. The former consists of the Revised Indonesian Regulation ("HIR"),[17] applicable to the islands of Java and Madura, and the Regulation for the Outer Islands ("RBg"),[18] applicable to the rest of the archipelago. These laws are the civil procedure for the country court (*pengadilan negeri*), previously known in Dutch as *landraad*. The country court was originally designed to try informal affairs of the indigenous population group, reflecting in part a colonial view of Indonesian legal customs and social needs. In the triennium to independence, its competence had been enlarged.

9 In addition to the country court, the Dutch East Indies also had the court of justice (*raad van justitie*). It was designed as the forum to settle disputes arising out of the Civil Code and/or the Commercial Code. At that time, these codes were applicable almost exclusively to the European

13 Supreme Court Regulation No 1/1990 Art 3, para 2.

14 Law No 30/1999 on Arbitration and Alternative Dispute Settlement (SGRI 1999-138, SSGRI 3872).

15 Point b of Art 66 of the Law No 30/1999 on Arbitration and Alternative Dispute Settlement (SGRI 1999-138, SSGRI 3872).

16 Elucidation to point b of Art 66 of the Law No 30/1999 on Arbitration and Alternative Dispute Settlement (SGRI 1999-138, SSGRI 3872).

17 S 1941-44.

18 S 1927-227.

and foreign Oriental population groups. The court of justice, which was also the court of appeal for cases from the country court, applied the Code of Civil Procedure ("Rv").[19]

10 In 1942, the Japanese Occupation Government re-organised the colonial judicial system. It disbanded the court of justice, but kept the country court. All disputes that used to be within the competence of the court of justice were devolved into the country court. Subsequently, the Rv was discontinued as positive law.

11 Henceforth judges have applied the HIR or the RBg to settle disputes arising from the Civil Code and/or the Commercial Code. However, although the Rv is no longer positive law, some of its provisions are nevertheless of importance. According to jurisprudence (*yurisprudensi*), some provisions of the Rv may be used as guidance (*pedoman*) when the HIR and the RBg are silent.[20] By means of judge-made law, judges may refer to its stipulations without stating that they are of the Rv.[21] Legal scholars have concurred with the court in using the stipulations of Rv as the recourse to legal proceedings.

12 Since independence, Indonesia has had several statutes governing the Judicature. The current statute is the Judiciary Power Law. Additionally, civil procedure is also stipulated in laws concerning the Supreme Court[22] and all courts under its supervision. As evident in the treatment of foreign arbitral awards, Supreme Court regulations are also important. The regulations, addressed to lower courts but undoubtedly affecting civil procedure, contain instructions and directions on how to administer justice.

19 S 1847-52 as revised by S 1849-63.

20 Surabaya High Court (13 December 1952) *Hukum* [Law magazine], No 1 (1954), at p 53.

21 Jakarta Country Court (17 January 1955) *Hukum*, No 1-2 (1956), at p 117.

22 Law No 14/1985 on the Supreme Court (SGRI 1985-73, SSGRI 3316) as amended by Law No 5/2004 on the Amendment to Law No 14/1985 on the Supreme Court (SGRI 2004-9, SSGRI 4359) as amended further by Law No 3/2009 on the Second Amendment to Law No 14/1985 on the Supreme Court (SGRI 2009-3, SSGRI 4958).

b Jurisprudence and doctrine

13 In addition to legislation, jurisprudence and doctrine can also be part of the positive law in Indonesia. Jurisprudence may mean decisional law. Decisional law arises when it is necessary for judges to make law (*penemuan hukum*, *rechtsvinding*), because they are not allowed to dismiss a case just because the law is unclear or they cannot refer to any written law.[23] The law therefore grants them the power to make gap-filling law. Another meaning of jurisprudence is previous decisions that are considered authoritative by judges in adjudicating disputes. Although these decisions are influential, judges are not bound to them.[24] The court's practice demonstrates that some jurisprudence has the effect of precedent, while others are non-binding to judges. Unfortunately, there is no clear guidance on which jurisprudence has the effect of precedent, and what is non-binding. It should be noted that decisions made by lower courts may also be considered as jurisprudence provided they are of importance as decisional law or have bearings on judges.

14 Due to the so-called principle of concordancy (*concordantiebeginsel*),[25] as a general rule, the civil and commercial law applicable to the European population group was the same as the law in force in the Netherlands. Consequently, as is evident from the below, judgments made by Dutch courts are observed by Indonesian judges. However, as Indonesia develops its own legal trajectory, the influence of Dutch court decisions is on the wane.

15 Doctrine refers to the teachings of legal scholars. The existence of doctrine in Indonesian law reveals that some part of it belongs to the civil law tradition. The importance of doctrine, however, is due to the pluralism, as well as the transitory nature of some parts of Indonesian

23 Article 22 of the General Provisions of Legislation for Indonesia (*Algemene Bepalingen van Wetgeving voor Indonesië*) S 1847-23; Art 10:1 of the Law No 48/2009 on Judiciary Power (SGRI 2009-157, SSGRI 5076).

24 Mahkamah Agung Republik Indonesia, *Naskah Akademis tentang Pembentukan Hukum Melalui Yurisprudensi* [Academic Paper on Law Making through Jurisprudence] (Mahkamah Agung Republik Indonesia, 2005) at pp 57–83.

25 Paragraph 2(a) of Art 131 of the *Wet op de Staatsinrichting van Nederland-Indië* (S 1925-415) which was a quasi-constitution for the Dutch East Indies.

law. Due to the wording of the Transitional Provisions of the Constitution, colonial statutes are transitory in nature.[26] Legal scholars have been filling the legal gap by explaining the nature of the law and proposing what the law should be.

c Types of judgment

16 The lack of provisions on private international law means that judges have to look to legislation of a domestic nature in order to determine international civil procedure. They will therefore consider foreign judgments from the lens of the (national) law of civil procedure. Accordingly, an understanding on the types of judgment is important.

17 Indonesian judges pronounce either judgments (*putusan*, *vonnis*) or rulings (*penetapan*, *bepaling*). Judgments are the court's decision in settling a dispute between the parties. The legal proceedings begin with the plaintiff filing a lawsuit (*gugatan*). Rulings, on the other hand, are the court's response to a petitioner's request (*permohonan*). This is a non-dispute proceeding. There is no specific article of law that distinguishes between judgments and rulings. The acknowledgment of these two types of pronouncements is based on doctrine that has been accepted in court practices.[27]

18 There are two types of judgment based on the time of its issuance. The first is final judgments (*putusan akhir*, *eindvonnis*) that settle

26 Sudargo Gautama & Robert N Hornick, *An Introduction to Indonesian Law* (Alumni, 1972) at pp 178–179. Article II of the Transitional Provision of the 1945 Constitution of the Republic of Indonesia stipulates that "[a]ll existing institutions and regulations valid at the date of independence shall continue to be valid, pending the enactment of new legislation in conformity with this Constitution". The Fourth Amendment to the Constitution splits up this stipulation into two articles. Article I of the Transitional Provisions now stipulates that "[a]ll existing regulations remain valid until the enactment of new legislation based on this Constitution".

27 Retnowulan Sutantio & Iskandar Oeripkartawinata, *Hukum Acara Perdata dalam Teori dan Praktek* [Civil Procedural Law in Theory and Practice] (Mandar Maju, 2005) at p 10.

disputes.[28] Only final judgments (whether Indonesian or foreign) are enforceable.[29] If the losing party refuses to co-operate, the winning party can seek assistance from a process server of the court (*juru sita*) to execute the judgment. A caption (*irah-irah*) bearing the wordings "For the Sake of Justice based on God Almighty" (*Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*) grants executorial title to judgments.[30]

19 The second is interim judgments (*putusan sela*, *putusan antara*, *tussenvonnis*) rendered before final judgments. The purpose of interim judgments is to facilitate the continuation of proceedings, and dispute settlements. Although the HIR and the RBg mention types of judgment other than a final judgment, neither law contains a name for such judgments. The elaboration of interim judgments is found in the Rv.

20 Based on the substance of the decision (*amar*, *dictum*), doctrine classifies final judgments into one of three categories: condemnatory, declaratory, or constitutive. Condemnatory judgments require one of the parties to the disputes to conduct something, *eg*, to pay a certain amount of money to another party (money judgments). Declaratory judgments state or affirm the legitimacy of certain legal relations as requested by the claimant. Constitutive judgments rule out a legal relation, *eg*, stating a marriage is dissolved. It can also establish a new legal relation, for example, to acknowledging the adoption of a child. Condemnatory judgments are considered a judgment proper (*putusan*), whereas declaratory and constitutive judgments are considered rulings (*ketetapan*). Given the lack of specific regulations on the recognition and enforcement of foreign judgments, this classification gives insight into how Indonesian courts may treat foreign judgments.

28 Article 185:1 of the Revised Indonesian Regulation (S 1941-44); Art 192:1 of the Regulation for the Outer Islands (S 1927-227).

29 A default judgment can be considered as a final judgment when the absent party does not use the means of protest within the limited time period, *ie*, 14 days.

30 Art 2:1 of the Law No 48/2009 on Judiciary Power (SGRI 2009-157, SSGRI 5076). Article 54:1 of the Law No 30/1999 on Arbitration and Alternative Dispute Settlement (SGRI 1999-138, SSGRI 3872) stipulates arbitral awards must also bear the wordings.

d Foreign judgments

21 There is no definition of "foreign judgment" in Indonesian law. In practice, it is understood that "foreign" means a country other than Indonesia. "Judgment" means a judicial decision made by a foreign court or authority.[31]

e Principles for recognition and enforcement

22 Article 22a of the General Provisions of Legislation for Indonesia[32] establishes guidelines that indicate that the court's competence and the execution of its judgments as well as notarial deeds are limited to international law. The article contains the so-called principle of territorial sovereignty and the principle of judicial sovereignty.[33] In *Nederlandsche Handel Maatschappij NV Agentschap Medan v Jacob van der Knaap*,[34] the Supreme Court had recourse to these principles when it rejected an application for cassation (*kasasi*)[35] to execute a judgment rendered by a Dutch court.

23 The ambit of international law and the above principles indicate that a bilateral or multilateral treaty on judicial co-operation is a prerequisite for the recognition and enforcement of foreign judgments. In other words, a foreign judgment can only be recognised and enforced if there is a bilateral or multilateral treaty between the Republic of Indonesia and the foreign country. In *PT Nizwar v Navigation Maritime Bulgare*,[36] the Supreme Court affirmed that in principle foreign judgments and foreign arbitral awards could not be enforced in Indonesia. Despite Indonesia's accession to the New York Convention,

31 Yahya Harahap, *Hukum Acara Perdata* [Civil Procedural Law] (Sinar Grafika, 2008).

32 S 1847-23.

33 Sudargo Gautama, *Hukum Perdata Internasional Indonesia* [Indonesian Private International Law] vol III part 2 (Alumni, 1987) at p 279.

34 Reg No 198 K/Sip/1953 (30 March 1955), reported in *Hukum*, No 3–4 (1956), at pp 21–24.

35 Cassation is a review made by Justices of the Supreme Court on application of law by lower court judges.

36 Reg No 2944 K/Pdt/1983 (29 November 1984).

the Supreme Court refused to issue a writ of execution (*exequatur*) for a money judgment award from an arbitration in London against PT Nizwar. The court was of the opinion that the issuance of exequatur required implementing regulations at national level of the New York Convention. This situation was resolved by the Supreme Court Regulation No 1/1990. Subsequently, the Arbitration Law stipulated the execution procedure for international arbitral awards.

24 Currently, Indonesia is not bound by any international treaty on the recognition and enforcement of foreign judgments. Consequently, given the current state of law, the court is not bound to enforce foreign judgments.

25 However, this reporter needs to point out that in 1978, Indonesia and Thailand signed an Agreement on Judicial Co-operation.[37] The agreement was modelled after the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Although it does not cover the recognition and enforcement of judgments, the agreement should make legal proceedings involving the two countries less cumbersome. Unfortunately, as far as this reporter is aware, the treaty has not been used.

f Recognition and enforcement are two separate concepts

26 Indonesian law distinguishes recognition from the enforcement of foreign judgments. Legal scholars argue that in extending recognition, the court is passive because it is only required to acknowledge the existence of foreign judgments.[38] Contrary to recognition, enforcement requires the court to actively participate in rendering assistance to the creditors of foreign judgments.

37 Presidential Decree No 6/1978 on Agreement on Judicial Co-operation between the Republic of Indonesia and the Kingdom of Thailand (SG 1978-17).

38 Sudargo Gautama, "International Civil Procedure in Indonesia" (1996) 6 Asian YB Int'l L 87 at 96–97; Purnadi Purbacaraka & Agus Brotosusilo, *Sendi-sendi Hukum Perdata Internasional Suatu Orientasi* [Elements of Private International Law An Orientation] (RajaGrafindo Persada, 1994) at p 79.

27 If the losing party to a dispute voluntarily complies with the foreign decision, whether it is a judicial settlement or a judgment, the Indonesian court is in no position to extend recognition or assist in enforcement. If the losing party refuses to co-operate, the winning party must seek help from the court to exercise his rights.

g Absence of rule for recognition and enforcement of foreign judgments

28 The HIR and the RBg do not contain any provision stipulating the recognition and enforcement of foreign judgments. This is also the case in other statutes on civil procedure, including the Judiciary Power Law. Therefore, both judges and legal scholars have recourse to the stipulation of the Rv.

h Jurisprudence and doctrine on recognition and enforcement of foreign judgments

29 Paragraph 1 of Article 436 of the Rv states that foreign judgments are not enforceable in Indonesia. Instead, regardless of the foreign judgment, the parties to the dispute will have to file a lawsuit before the Indonesian court, which will try the dispute afresh.[39] The country court or the commercial court, depending on the nature of dispute, will not treat the dispute as *res judicata*. The parties may provide the foreign judgment as *prima facie* evidence.[40]

30 On the issue of foreign judgments as evidence, doctrine identifies the *Bontmantel arrest*[41] as the case in point.[42] A Dutch firm started recovery proceedings before the court in the Netherlands after its unsuccessful attempt in England. The English court rejected its claim to

39 Paragraph 2 of Art 436 of the Code of Civil Procedure (S 1847-52 as revised by S 1849-63). Apart from having the discretion to treat the foreign judgment as *prima facie* evidence, there is no authority on what other factors, if any, the court will consider when trying the matter afresh.

40 Sudargo Gautama, *Essays in Indonesian Law* (Citra Aditya Bakti, 1993) at p 447.

41 *Hoge Raad* [Dutch Supreme Court] (14 November 1924) N J 1831, 890.

42 Sudargo Gautama, *Indonesian Business Law* (Citra Aditya Bakti, 2006) at pp 525–526.

recover payment from a British widow for an unpaid coat her husband bought for his mistress. The Dutch court rejected the claim on the ground that the basis of the claim was an immoral transaction. Although based on Article 431 of the Dutch Code of Civil Procedure, which is *in pari materia* with Article 436 of the Indonesian Code of Civil Procedure, a foreign judgment does not have the effect of *res judicata*, instead the court is free to consider and evaluate the value of the foreign judgment.

31 In *Harjani Prem Ramchand v Merrill Lynch International Bank Ltd Singapore Branch*,[43] the Central Jakarta Country Court reaffirmed the rule that foreign judgments are not enforceable in Indonesia. Ramchand, an Indonesian national, asked the court to declare that Merrill Lynch had committed a tort (*perbuatan melanggar hukum*) based on an order of the Singapore High Court. The Jakarta Court refused the plaintiff's request and instead ruled that it had jurisdiction to adjudicate the case. The court considered the Singapore judgment as evidence when adjudicating.

32 An exception is made for foreign judgments that are in respect of the principle of general average (*averij grosse*) for salvage.[44] The Shipping Law provides that expenses incurred in respect of the common safety of a ship have top priority over all financial obligations.[45] The judgment creditor must obtain a writ of execution from the Indonesian court.[46] In the procedure submitting the request for a writ of execution, the court will not investigate the matter anew. The execution procedure for general average is now regulated by the Shipping Law.[47]

43 Central Jakarta Country Court No 389/PDT.

44 Paragraph 1 of Art 436 of the Code of Civil Procedure (S 1847-52 as revised by S 1849-63) and art 724 of the Commercial Code (S 1847-23).

45 Arts 65:2 and 66:4 of the Law No 17/2008 on Shipping (SGRI 2008-64, SSGRI 4849).

46 Paragraph 3 of Art 436 of the Code of Civil Procedure (S 1847-52 as revised by S 1849-63) ("Rv"). It should be noted that, as it is also the case in para 5 of Art 724 of the Commercial Code (S 1847-23), para 3 of Art 436 of the Rv designates court of justice (*raad van justitie*) to issue the writs of execution.

47 Article 223:1 of the Law No 17/2008 on Shipping (SGRI 2008-64, SSGRI 4849). The use of the word *pengadilan* (court) should be understood that the law designates the country court.

33 Legal scholars are of the opinion that the stipulation of Article 436 of the Rv only deals with the execution of foreign judgments.[48] Therefore, its scope is limited to condemnatory judgments regardless of whether it is money or non-money judgment.[49] Declaratory and constitutive decisions are not regarded as coming within the wording of paragraph 1 of Article 436 of the Rv. Since the nature of declaratory and constitutive decisions only require Indonesian courts to recognise their existence, and not to assist with execution, it is acknowledged that, subject to public policy of the Indonesian forum, recognition can duly be extended (provided of course there is a bilateral or multilateral treaty in place).[50]

34 Two decisions by the Dutch Supreme Court have been put forward as evidence for the recognition of decisions on personal status.[51] In the *first Swiss child* of 1931,[52] the Dutch Supreme Court was confronted with a Swiss judgment that had decided that a child was born out of wedlock and granted alimony for the child's upbringing. The court recognised the child's status, but refused enforcement of alimony in the Netherlands as it was a condemnatory money judgment. In the *second Swiss child* of 1938,[53] the same court was again confronted with a foreign judgment that granted alimony to a Swiss child of a Dutch father. The court held that the Swiss decision was a money judgment. The court then considered the matter anew, and applied Dutch law in determining the issue of alimony payment.

35 Theoretically, foreign judgments that are declaratory or constitutive in nature may be relevant in a dispute before the Indonesian court. For example, the court may have to decide a dispute on the validity of shares acquisition or in respect of the ownership of property, bankruptcy, voiding and recession of contracts. If the shares were part of marital

48 Sudargo Gautama, *Hukum Perdata Internasional Indonesia* [Indonesian Private International Law] vol III part 2 (Alumni, 1987) at p 282.

49 *Eg*, orders for specific performance and injunctions.

50 Sudargo Gautama, *Indonesian Business Law* (Citra Aditya Bakti, 2006) at p 522.

51 Sudargo Gautama, *Indonesian Business Law* (Citra Aditya Bakti, 2006) at pp 526–528.

52 *Hoge Raad* [Dutch Supreme Court] (20 March 1931) N J 1931, 890.

53 *Hoge Raad* [Dutch Supreme Court] (1 April 1938) N J 1938, 989.

property and a foreign judgment has dissolved the marriage, will the court recognise the foreign judgment and use it as a ground for its decision? The answer to this question is inconclusive since, to best of this reporter's knowledge, there is no jurisprudence available.

C CONCLUSION

36 As a rule, foreign judgments are not enforceable in Indonesia. Unless the foreign judgment is in respect of the general salvage of maritime claims, the Indonesian courts are not bound by foreign judgments in respect of condemnatory decisions (which are neither recognisable nor enforceable). The court will instead try the matter anew. Therefore, the dispute will not be treated as *res judicata*. The parties may submit the foreign judgment as evidence before the proceedings in Indonesia. Judges are free to evaluate the foreign judgment, on a case-by-case basis. Whether they will review the merits of the foreign judgment is unclear. Therefore, even as evidence, the foreign judgment is not conclusive.

37 Unlike condemnatory judgments, doctrine suggests that foreign judgments of a declaratory or constitutive nature will be recognised by the Indonesian courts. The argument is based on the fact that the court will only have to recognise their existence.

Country Report
JAPAN

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A LEGAL SOURCES FOR RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN JAPAN

1 Japan is a civil law country where statutes are the main source of law. Japan is not a signatory to any multilateral or bilateral treaty dealing with the recognition and enforcement of foreign judgments; thus the effect of foreign judgments in Japan is determined in accordance with the rules entrenched in the Code of Civil Procedure[1] ("CCP") and Civil Execution Act[2] ("CEA"). Article 118 of the CCP and Article 24 of the CEA set out the general principles for the recognition and enforcement of foreign judgments in Japan. However, since those two statutes contain general rules on recognition and enforcement of foreign judgments, Japanese courts have developed extensive jurisprudence and procedures over time and, although court decisions are not granted official status as law in Japan, they do have strong precedential value.

2 This report focuses on the practice of Japanese courts in recognising and enforcing judgments rendered by the courts of countries in Asia in civil and commercial matters. It should be noted at the outset that there is no clear distinction between *in personam* and *in rem* judgments in Japanese law. Therefore, this report will begin by outlining the general principles of recognition of *in personam* judgments in Japan,[3] highlight the main enforcement procedures of *in personam* judgments,[4] and touch

1 Law No 109 of 26 June 1996, as amended.
2 Law No 4 of 1979, as amended.
3 See paras 3–16 below.
4 See paras 17–22 below.

upon the peculiarities related to the recognition and enforcement of *in rem* judgments.[5]

B RECOGNITION OF *IN PERSONAM* JUDGMENTS

3 In Japan, a foreign judgment will be recognised if it is final and satisfies all of the following four requirements set out in Article 118 of the CCP: (a) the foreign court should have jurisdiction over the case based on Japanese law or a treaty to which Japan is a party; (b) the process was duly served on the unsuccessful party, or the unsuccessful party voluntarily answered the complaint; (c) the foreign judgment and the foreign court proceedings are not incompatible with public policy in Japan; and (d) the foreign country would recognise a similar judgment rendered in Japan (reciprocity requirement). These requirements are considered to strike the appropriate balance between the respect of foreign judgments, the interests of the Japanese party against whom the judgment is to be enforced, and the public policy interests of Japan.

i *Notion of final judgment of foreign court*

4 The "judgment of a foreign court" means any judgment, decision, order or decree rendered by a foreign court in a dispute on private law matters.[6] Judgments may be monetary[7] or non-monetary[8] and include summary judgments which have been issued in adversarial proceedings.[9] Japanese courts also recognise court costs orders.[10] Judgments issued in proceedings where the defendant failed to appear before the court,[11] *ie*, default judgments, could also be recognised provided the Japanese

5 See para 23 below.
6 (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.
7 This includes the element of interest on the award.
8 *Eg*, declaratory orders and orders for specific performance.
9 (Tokyo District Court) (25 February 1998) *Hanrei Taimuzu* No 972, at p 258.
10 (Nagoya District Court) (6 February 1987) *Hanrei Taimuzu* No 627, at p 244; (Tokyo District Court) (13 November 1967) *Hanrei Taimuzu* No 215, at p 173.
11 (Tokyo District Court) (14 January 1994) *Hanrei Jihō* No 1509, at p 96; (Nagoya District Court) (6 February 1987) *Hanrei Jihō* supra note; (Tokyo District Court) (31 January 1994) *Hanrei Jihō* No 1509, at p 101.

courts consider that procedural fairness was satisfied by the rendering court.[12] The Supreme Court of Japan has confirmed in its recent judgment that a permanent injunction order could be recognised.[13] There is no reported case dealing with the recognition of an interlocutory judgment, however, this reporter considers it unlikely that an interlocutory judgment would be a judgment for these purposes.[14] On the other hand, the notion of judgment does not encompass judgments in administrative or insolvency cases. Similarly, admissions or waivers of claims, judicial settlements, demands for payment or notarial deeds are not considered to fall under the notion of "judgment" and therefore cannot be recognised and enforced in Japan.

5 Only final and binding foreign judgments can be recognised and enforced in Japan.[15] Finality means that a judgment can no longer be appealed in accordance with the normal procedures of the relevant foreign country. Although the CCP does not contain a definition of a "foreign court", a foreign court is understood to be a judicial body of a foreign state which has jurisdiction to hear civil disputes, irrespective of how it is named in the respective foreign country.

6 According to the prevailing academic view and case law, provisional measures and preliminary judgments do not fall within the notion of a "judgment". Therefore, Japanese courts will refuse to give effect to such measures.[16] It is also questionable whether the Japanese courts would recognise a freezing order as an order *in personam*, since, in order to apply

12 (Tokyo High Court) (15 November 1993) *Hanrei Taimuzu* No 835, at p 132.

13 (Supreme Court of Japan) (24 April 2014) *Minshū* No 68-4, at p 329.

14 An interlocutory judgment under Japanese law has a self-binding effect on the court, but it does not give rise to *res judicata* (*ie*, a Japanese interlocutory judgment is considered to bind the court in the sense that they cannot render a decision on the same issue again). Therefore, if a foreign interlocutory judgment is similar to the Japanese equivalent, its recognition would not be possible.

15 See Art 118 of the Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) and Art 24(3) of the Civil Execution Act (Law No 4 of 1979, as amended).

16 (Supreme Court of Japan) (26 February 1985) *Katei Saiban Geppō* vol 37, No 6, at p 25.

for *kari-sashiosae* order with freezing effects under Japanese law, the assets to be frozen must be specifically identified except movable goods.[17]

ii *Jurisdiction of rendering court*

7 First, the question as to whether a foreign court has jurisdiction to render a judgment is determined under Japanese law or treaties that have been ratified by Japan. Until now, Japan has not entered into bilateral or multilateral treaties with any foreign nations in respect of the recognition and enforcement of foreign judgments. Therefore, the Japanese courts adhere to "*Jōri*", *ie*, the general principles of reason, fairness between the parties and the need to facilitate swift adjudication of disputes. In the light of such considerations, Japanese courts have usually checked whether the rendering court had jurisdiction under the international jurisdiction rules from the Japanese viewpoint (the so-called "mirror-image" approach).[18] Since there were no provisions in respect of international jurisdiction in the CCP, the Japanese courts referred to the provisions on domestic jurisdiction. The Japanese courts have concretely upheld international jurisdiction in situations where the foreign court's jurisdiction was based on the domicile of the defendant[19] or the principal place of business of the defendant in the forum state,[20] where the performance of a contractual obligation is in the forum state,[21] where a tort occurred in the state of the rendering court,[22] or where the parties have made a choice of court agreement in favour of that rendering court,[23] as well as in cases where the defendant submitted to the jurisdiction by appearing in the proceedings in the rendering court.[24]

17 Civil Provisional Remedies Act (*Minji Hozen Hō*) (Law No 91 of 22 December 1989) Art 21.
18 (Tokyo District Court) (14 January 1994) *Hanrei Jihō* No 1509, at p 96.
19 (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.
20 (Supreme Court of Japan) (26 September 2002) *Minshū* No 56-7, at p 1551.
21 (Tokyo District Court) (14 January 1994) *Hanrei Jihō* No 1509, at p 96.
22 (Tokyo District Court) (13 February 1998) *Hanrei Taimuzu* No 987, at p 282.
23 (Supreme Court of Japan) (28 November 1975) *Minshū* No 29-10, at p 1554. The treatment of choice of court agreements is now dealt with in Art 3-7 of the Code of Civil Procedure (Law No 109 of 26 June 1996, as amended).
24 (Nagoya District Court) (6 February 1987) *Hanrei Jihō* No 1236, at p 113.

8 It should be noted that the above practice of the Japanese courts must be considered in the light of the recent amendment to the Code of Civil Procedure. In 2012, the Code of Civil Procedure was amended[25] by adding a set of international jurisdiction rules which set out a list of grounds on which Japanese courts can assert jurisdiction in cases with a foreign element.[26] The Supreme Court of Japan has recently clarified that these newly introduced provisions on international jurisdictions should, in principle, be thresholds to judge if the requirement of jurisdiction of foreign courts in Article 118(i) of the CCP could be satisfied.[27] As a consequence, foreign judgments on matters which would fall under the scope of the exclusive jurisdiction[28] of the Japanese courts, such as actions involving "the existence or absence or the validity of an intellectual

25 See Masato Dogauchi *et al*, "New Japanese Rules on International Jurisdiction: Part One" (2011) 54 *Japanese Yearbook of International Law* 260 at 260–332 and Yoshiaki Nomura *et al*, "New Japanese Rules on International Jurisdiction: Part Two" (2012) 55 *Japanese Yearbook of International Law* 263 at 263–322.

26 Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) Arts 3-2–3-12.

27 (Supreme Court of Japan) (24 April 2014) *Minshū* No 68-4, at p 329. Issues in this case were whether a US judgment on compensatory damage recovery and an injunction based on the infringement of trade secret could be recognised in Japan. The Tokyo High Court denied recognition, since, according to the court, there was no evidence that damage had occurred in the US. The Supreme Court of Japan, on the other hand, stated that, so long as it is proven that there is a certain "possibility" that infringing acts or damage occurred in the US, the injunction might be recognisable, by reference to Art 3-3(viii) [international jurisdiction on tort] of the Code of Civil Procedure (Law No 109 of 26 June 1996, as amended). If so, according to the Supreme Court of Japan, the judgment on damage recovery might be recognisable as well, based on Art 3-6 [joinder of claims]. For this reason, the Supreme Court of Japan annulled the judgment of the Tokyo High Court and remanded the case to it.

A peculiar rule in the new provisions is Art 3-9, which allows the Japanese courts to take special circumstances into consideration and to dismiss claims, even if the jurisdiction of the Japanese courts could be established according to one of the new provisions. This provision reflects the established case law in Japan. The Supreme Court of Japan has recently clarified that a litigation pending in a foreign court could be special circumstances to dismiss claims in Japan, when both claims are related and evidences are concentrated in the foreign country ((Supreme Court of Japan) (10 March 2016) *Minshū* vol 70, No 3, at p 846). It is, however, still unclear how this provision would affect the recognition of foreign judgments.

28 Article 3-5 of the Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) provides for the exclusive jurisdiction of Japanese courts.

property right … that arises through a registration establishing … if that registration was made in Japan",[29] could not be recognised in Japan.

iii *Service*

9 Second, the Japanese courts have to verify whether the unsuccessful party has been served with the summons that is necessary to initiate court proceedings or whether the unsuccessful party has availed itself even without being served with the summons of an official order. In one of its landmark judgments, the Supreme Court of Japan held that service must be such that the defendant understood that legal proceedings were commenced against him and that the defendant's defence was not prevented.[30] On several occasions, the lower instance courts have held that the service of complaints by post without attaching a Japanese translation is not valid under Article 118(ii) of the CCP.[31] Service by public notice is not sufficient.[32]

10 Japan is a member of the Hague Service Convention[33] which mandates service through diplomatic channels.[34] The Supreme Court of Japan has held that if there is a treaty on judicial co-operation between Japan and the country of the rendering court, the service must fulfil the

29 Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) Art 3-5(3).

30 (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.

31 (Tokyo District Court) (21 December 1976) *Hanrei Taimuzu* No 352, at p 246; (Tokyo District Court) (11 November 1988) *Hanrei Jihō* No 1315, at p 96; (Tokyo District Court) (26 March 1990) *Kin'yū Shōji Hanrei* No 857, at p 39 (enforcement of a Hawaiian default judgment denied on the ground that the service had been mailed directly from Hawaii to the defendant resident in Japan without a Japanese translation attached); (Tokyo District Court) (8 December 1997) *Hanrei Taimuzu* No 976, at p 235; (Tokyo District Court) (10 December 2014) *Hanrei Jihō* No 2306, at p 73 (examined if the defendant had sufficient capacity to understand the content).

32 Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) Art 118(ii).

33 Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").

34 Australia, China, India, Japan, South Korea and Vietnam are also members of the Hague Service Convention.

requirements of that treaty.[35] In this regard, the Supreme Court of Japan held that direct delivery of service documents by a consignee privately hired by the plaintiff did not comply with the Hague Service Convention nor the Consular Convention between the UK and Japan,[36] so that such service was not valid under Article 118(ii) of the CCP.[37]

11 Japan has not declared that it objects to service by post (which is permissible under Article 10(a) of the Hague Service Convention); however, Japan will only accept such service if it occurred as a matter of fact,[38] but not as a new lawful service.[39] Whether service by post would satisfy Article 118 of the CCP would need to be independently examined.

iv *Public policy*

12 Article 118(iii) of the CCP requires that a foreign judgment whose recognition is sought must not be contrary to the public policy or good morals of Japan. The notion of public policy encompasses both the substance of the judgment as well as the litigation proceedings at the end of which that judgment is made.[40] It is well-settled law that foreign *in personam* judgments that require the unsuccessful party to pay punitive damages in addition to compensatory damages and costs are against the public policy of Japan and cannot be recognised in Japan in respect of the punitive portion.[41] The recognition and execution of a foreign judgment

35 (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.

36 Consular Convention between the United Kingdom of Great Britain and Northern Ireland and Japan (Tokyo, 4 May 1964). Japan signed a consular convention with the US as well: Consular Convention between the United States of America and Japan (Tokyo, 22 March 1963).

37 (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.

38 A matter of "fact" here means that Japan does not consider service by post as violating its sovereignty.

39 (Tokyo District Court, Hachiōji Branch) (8 December 1997) *Hanrei Taimuzu* No 976, at p 235.

40 (Tokyo District Court) (6 September 1969) *Hanrei Taimuzu* No 242, at p 263.

41 (Supreme Court of Japan) (11 July 1997) *Minshū* No 51-6, at p 2573.

ordering a payment of gambling debts might be problematic as it could be seen as being contrary to Japanese substantive public policy.[42]

13 Procedural public policy would be deemed as being undermined and would thereby prevent the recognition and enforcement of a foreign judgment which was obtained by fraudulent means (*eg*, falsification of deeds or certificates)[43] or if there had been other procedural defects, where the tribunal was acting in an unfair manner,[44] where principles of due process have been violated, or where the defendant was not given timely notice about important procedural matters.

14 In one case, the Osaka District Court refused to recognise a US judgment because there was a conflicting final Japanese judgment between the same parties on the same cause of action.[45]

15 There is no precedent as to which judgment would be recognised if there were two conflicting foreign judgments between the same parties and on the same subject matter before the Japanese court.[46]

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42 On this point, one can consider a case related to gambling, where the issue was not about the recognition of foreign judgments, but was about the applicable law. In this case, a US company sued the Japanese government, arguing that the Japanese government was unjustly enriched through confiscation. The confiscated money was originally collected by the plaintiff's agent in Japan from some Japanese individuals who owed debts to the plaintiff from their gambling in Las Vegas. The Tokyo District Court stated that applying Nevada law would not violate the public policy in Japan, but this opinion was criticised: (Tokyo District Court) (29 January 1993) *Hanrei Taimuzu* No 818, at p 56.

43 (Tokyo High Court) (27 February 1990) *Hanrei Jihō* No 1344, at p 139; (Tokyo District Court) (14 January 1994) *Hanrei Jihō* No 1509, at p 96.

44 *Eg*, where the rendering court gave sufficient time to one party only.

45 (Osaka District Court) (22 December 1977) *Hanrei Taimuzu* No 362, at p 127. There is no precedent as to whether a foreign judgment could be recognised and enforced in cases where the proceedings between the same parties and the same cause of action are still pending in a Japanese court.

46 In one purely domestic case, a suit for a negative declaration in respect of a payment obligation was pending, when a counterclaim for payment between the same parties and based on the same contract was filed. In that case, the Supreme Court of Japan held that, after the filing of the second suit, there was no interest in maintaining the first suit for negative declaration: (25 March 2004) *Minshū* vol 58, No 3, at p 753. As an analogy from this case, it could be possible that between two

(*continued on the next page*)

v *Reciprocity*

16 Fourth, a judgment may only be recognised and enforced in Japan if the reciprocity requirement is satisfied. Japanese courts have generally been generous in finding reciprocity between Japan and foreign nations whose court judgments are to be recognised. The Supreme Court of Japan held that reciprocity exists if the conditions for the recognition of a similar type of Japanese judgment in that foreign country are not substantially different from the conditions set out in Article 118 of the CCP.[47] Japanese courts have recognised judgments rendered by courts of Australia,[48] Hong Kong,[49] and Singapore.[50] However, Japanese courts do not recognise judgments rendered by courts of the People's Republic of China.[51]

conflicting foreign judgments, one of which is a negative declaratory judgment, the claim for the recognition of the negative declaratory judgment might be dismissed.

47 (Supreme Court of Japan) (7 June 1983) *Minshū* No 37-5, at p 611.

48 (Tokyo District Court) (25 February 1998) *Hanrei Taimuzu* No 972, at p 258.

49 (Kobe District Court) (22 September 1993); (Supreme Court of Japan) (28 April 1998) *Minshū* No 52-3, at p 853.

50 (Tokyo District Court) (19 January 2006) *Hanrei Taimuzu* No 1229, at p 334. The list covers only judgments in Asia. Judgments from countries such as Indonesia and Thailand would not be recognised by Japanese courts, since the courts in these countries do not recognise foreign judgments.

51 (Osaka High Court) (9 April 2003) *Hanrei Jihō* No 1841, at p 111; (Tokyo District Court) (20 March 2015) *Hanrei Taimuzu* No 1422, at p 348; as its appeal judgment also denied reciprocity with China: (Tokyo High Court) (25 November 2015) *Heisei* 27 (ne) No 2461 (unpublished). This judgment of the Tokyo High Court was further appealed to the Supreme Court of Japan, but the Supreme Court of Japan rejected the appeal: (20 April 2016) *Heisei* 28 (o) No 350 (unpublished). According to these judgments, this is on the basis of the interpretation of the Supreme People's Court of the People's Republic of China in 1994 (Notice No 17) that the Supreme People's Court would not permit recognition nor enforcement of Japanese judgments.

C ENFORCEMENT OF *IN PERSONAM* JUDGMENTS

i *General principles of enforcing a foreign judgment in Japan*

17 In order to enforce a foreign judgment in Japan, the successful party must file a suit in the court in Japan to obtain an enforcement judgment.[52] In principle, such proceedings must be instituted in the court which has jurisdiction over the unsuccessful party. In cases where it is not possible to determine the residence of the judgment-debtor, an action for recognition and enforcement must be instituted in the district of the location of the subject matter of the claim or the property to be seised.[53]

18 The court which is petitioned for the recognition and enforcement of the foreign judgment will consider whether the conditions for recognition provided in Article 118 of the CCP are met and whether the judgment can be enforced in Japan.[54] If those conditions for recognition and enforcement are satisfied, the recognising court will issue an enforcement judgment (*shikkō hanketsu*). The enforcement judgment serves as a title of debt which is necessary to institute enforcement proceedings in Japan.

19 Japanese law does not include any statutory limitations for the enforcement of foreign judgments. However, pursuant to Articles 157(2) and 174-2 of the Civil Code,[55] the rights established by a judgment of a Japanese court are subject to a ten-year limitation period which commences from the time the judgment becomes final and binding. Accordingly, the recognition and enforcement of a foreign judgment which became final more than ten years prior to the commencement of the enforcement proceedings might be refused on the grounds of public policy.[56]

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52 Civil Execution Act (Law No 4 of 1979, as amended) Art 22(6).

53 Civil Execution Act (Law No 4 of 1979, as amended) Art 24.

54 Civil Execution Act (Law No 4 of 1979, as amended) Art 24(3).

55 Law No 89 of 27 April 1896.

56 A longer duration of statutory limitation under a foreign law would not necessarily violate the public policy of Japan: (Tokushima District Court) (16 December 1969) *Hanrei Taimuzu* No 254, at p 209. Therefore, by analogy, it could be possible that a foreign judgment rendered more than ten years ago may be

(*continued on the next page*)

20 As a matter of principle, in deciding the questions of recognition and enforcement, Japanese courts will not review the merits of the case,[57] nor would Japanese courts check whether the foreign law was correctly applied. The Tokyo District Court once recognised a judgment rendered by a foreign court, stating that to examine whether the rendering court applied the law which would have had to be applied in accordance with conflict of laws of Japan would violate this principle.[58]

ii *Possible defences by defendant*

21 The defendant may raise challenges related to the conditions set out in Article 118 of the CCP, either in the enforcement proceedings if enforcement is necessary, or directly concerning judgments which do not need enforcement.[59]

22 The defendant may not raise merit-based defences concerning his liability or the scope of the award of the foreign court's judgment. On the other hand, the defendant may raise defences and challenge the recognition and enforcement of a foreign judgment if the claim has lapsed, become extinct, was discharged or was otherwise revised. Theoretically, a party against whom a judgment has been issued in a foreign court could institute proceedings before the Japanese courts seeking negative declaratory judgment in order to prevent the enforcement of such foreign judgment, as long as *lis alibi pendens*[60] is not institutionalised in Japanese law.[61]

recognised. However, on the other hand, for the sake of procedural clarity, Japanese courts may prefer clear-cut outcomes.

57 Civil Execution Act (Law No 4 of 1979, as amended) Art 24(2).

58 See *eg*, (Tokyo District Court) (13 February 1998) *Hanrei Taimuzu* No 987, at p 282.

59 (Yokohama District Court) (19 October 1982) *Hanrei Jihō* No 1072, at p 135.

60 The rule permits a court to refuse to exercise jurisdiction when there is parallel litigation pending in another jurisdiction.

61 However, a Japanese court may deny its jurisdiction, applying Art 3-9 of the Code of Civil Procedure (Law No 109 of 26 June 1996, as amended): see (Supreme Court of Japan) (10 March 2016) *Minshū* vol 70, No 3, at p 846; at n 27 above.

D RECOGNITION AND ENFORCEMENT OF *IN REM* JUDGMENTS

23 As mentioned at the outset of this report, Japanese law does not contain a distinction between *in personam* and *in rem* judgments. However, as a matter of principle, Japanese courts are able to recognise only *in personam* judgments. *In rem* judgments cannot be recognised and enforced in Japan because *in rem* judgments usually concern the ownership of an object or asset and are supposed to have effects *vis-à-vis* the rest of the world.[62] Public policy and sovereignty considerations usually mean that such matters are subject to the exclusive jurisdiction of the courts where such objects are located. This is also the case in Japanese law.[63] If the foreign judgment deals with a matter which falls within the exclusive jurisdiction of the Japanese courts, it will be refused enforcement.[64]

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62 Typical examples of such *in rem* judgments are matters which have to be registered in public registries (*eg*, registration of legal entities, immovable assets or ships, or certain intellectual property rights such as patents or trademarks).

63 Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) Art 3-5. Japanese courts have exclusive jurisdictions over claims concerning registration, as long as the place of registration is in Japan, and existence as well as validity of the intellectual property which needs registration to be effective: Code of Civil Procedure (Law No 109 of 26 June 1996, as amended) Arts 3-5(2) and 3-5(3).

64 A typical case involving *in rem* measures would occur when a California court orders attachment and sales in an auction of a vessel which is registered in Japan and anchored in San Francisco. Assume that a court in California orders the assignment of ownership of that vessel to a third-party creditor. Such a third-party creditor may seek to enforce that Californian judgment in Japan; however, Japanese authorities will refuse to give effect to such a court order based on the grounds mentioned above.

Country Report
LAO

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1 Under Lao law, a court will only recognise and enforce a foreign court judgment or foreign arbitral award (hereinafter, collectively a "foreign judgment") if the Lao People's Democratic Republic ("Lao PDR") and the country which issued the foreign judgment are parties to a bilateral or multiparty agreement for the recognition and enforcement of a foreign judgment.[1] Absent such an agreement, a Lao court will refuse to recognise or enforce a foreign judgment.

2 Currently, the Lao PDR is party to three such agreements: (a) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention");[2] (b) Agreement on Judicial Cooperation in Civil and Criminal Matters between Lao PDR and the Socialist Republic of Vietnam ("Vietnam–Lao treaty");[3] and (c) Agreement on Judicial Cooperation in Civil and Criminal Matters between Lao PDR and the People's Republic of China ("China–Lao

1 Law on Civil Procedure (No 13/NA) (4 July 2012) Art 362.

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Lao People's Democratic Republic acceded to this multilateral agreement on 17 June 1998, and the agreement was entered into force on 15 September 1998.

3 This bilateral agreement, signed on 6 July 1998, applies to foreign court judgments and foreign arbitral awards: see Arts 44–46 of the Agreement on Judicial Cooperation in Civil and Criminal Matters between Lao PDR and the Socialist Republic of Vietnam (6 July 1998) ("Vietnam–Lao treaty").

treaty").[4] Lao PDR is not a party to the Hague Convention of 30 June 2005 on Choice of Court Agreements.

3 Lao law does provide for the recognition and enforcement of a foreign judgment. There is no distinction specified under Lao law between *in personam* and *in rem* judgments.[5] Specifically, the Amended Law on Civil Procedure[6] ("LCP") provides for the recognition and enforcement of a foreign judgment under certain conditions so long as both parties to the dispute are contracting members of the relevant multilateral or bilateral agreements.[7] Additionally, the Amended Law on the Resolution of Economic Disputes[8] ("LRED") specifically provides for the recognition and enforcement of foreign arbitral awards under the New York Convention to which Lao PDR is a party.[9] In addition to the conditions set out in the LCP and the LRED, the Vietnam–Lao treaty and the China–Lao treaty require that the foreign judgment is not barred by *res judicata*.[10]

4 This bilateral agreement, signed on 25 January 1999, applies to foreign court judgments and foreign arbitral awards: see Arts 20 and 26 of the Agreement on Judicial Cooperation in Civil and Criminal Matters between Lao PDR and the People's Republic of China (25 January 1999) ("China–Lao treaty").

5 In respect of foreign judgments relating to property, the law does require that such property be located within the Lao People's Democratic Republic to enable enforcement. Apart from that, there are no special conditions relating to the recognition and enforcement of foreign judgments relating to property.

6 No 13/NA (4 July 2012).

7 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Arts 362–368.

8 No 06/NA (17 December 2010).

9 Amended Law on the Resolution of Economic Disputes (No 06/NA) (17 December 2010) Art 52.

10 Article 45(3) of the Vietnam–Lao treaty provides, in part, that "in the past the Party receiving the request has never received a request relating to this same case from a third country to enforce or at the time of receiving the request the court of the receiving Party has never resolved or adjudicated this case". Article 21(1)(e) of the China–Lao treaty requires that the "case with the same parties and on the same matter has not been trialed by the court of the receiving party before the trial whereby the judgment was issued".

4 These two laws provide for the recognition and enforcement of both monetary[11] and non-monetary[12] foreign judgments subject to certain conditions (see below). For recognition and enforcement purposes, the court neither reviews a foreign judgment on the merits nor provides a *de novo* hearing on the claims.[13] The court does not examine the foreign judgment for errors of law or fact.[14] Instead, the court examines whether the foreign judgment satisfies the following conditions:

(a) the judgment is of a country which is a signatory to a treaty[15] to which the Lao PDR is also a signatory or party;[16]

(b) the judgment does not affect the sovereignty or does not violate the laws[17] of the Lao PDR;[18] and

11 This includes awards of money payable as debt or compensatory damages. Interest on damages is permitted; however, compound interest is not allowed in such calculations. See Art 56 of the Law on Contract and Tort (No 01/NA) (8 December 2008).

12 Non-monetary judgment could include final injunctions.

13 Interview with Bounkhouang Thavisack, the Chief of Cabinet of the Supreme Court, on 22 June 2017. See also Art 49(2) of the Vietnam–Lao treaty which specifies, in part, "[t]he competent authority to enforce the judgment will only enforce legally valid judgments *without having to do a re-trial and a reexamination of the judgment*" [emphasis added].

14 Interview with Bounkhouang Thavisack, the Chief of Cabinet of the Supreme Court, on 22 June 2017.

15 According to Bounkhouang Thavisack, the Chief of Cabinet of the Supreme Court, the Lao court understands this provision of the Amended Law on Civil Procedure (No 13/NA) (4 July 2012) to apply to treaties related to judicial co-operation and concerning the recognition and enforcement of foreign judgments.

16 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 362.

17 These reporters consider that this could potentially include fraud. Further, Lao law does not recognise exemplary or punitive damages in civil matters.

18 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 362. In comparison, Art 52 of the Amended Law on the Resolution of Economic Disputes (No 06/NA) (17 December 2010), has a narrower construction. Art 52 provides that the court will not recognise the foreign judgment if it "contradicts Lao law related to stability, peace and the environment". Given the choice between a narrow or broad reading of the two laws, a Lao court will likely adopt the broad reading to construe the intended meaning of the laws to require that no contradiction of any Lao laws exists for enforcement.

(c) the judgment does not affect the peace and social order of the Lao PDR.[19]

5 Additionally, the court is required to consider other conditions or criteria under the law. A court will not recognise or enforce a foreign judgment if:

(d) the judgment is subject to continuing proceedings or appeals and is not a final decision;[20]
(e) the losing party in the foreign judgment did not participate in the proceeding and the judgment was made in *absentia*;[21]
(f) the matter considered by the foreign court should have been considered under the jurisdiction of the Lao PDR courts;[22]
(g) the disputing party who has the obligation to pay the award debt does not have property, business operation, equity, bank deposits or other assets in the Lao PDR;[23] or
(h) there are other issues relating to the foreign judgment.[24]

6 At the time of writing, there are two foreign judgments before the Lao courts that are seeking recognition and enforcement.[25] Cases pending in the courts are not normally published or easily accessible by non-parties. Due to the low number of cases and issues of inaccessibility – final decisions are not normally published – there is insufficient case

19 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 362.
20 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 366.
21 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 366.
22 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 366. This covers matters within the Lao court's exclusive jurisdiction, such as, *eg*, when a provision of an agreement specifies only Lao courts are to adjudicate a dispute. It is unclear to what extent, if at all, a Lao court could assert exclusive jurisdiction in a case in which the parties and assets are located in Laos but the parties have selected another foreign court to adjudicate their dispute.
23 Amended Law on the Resolution of Economic Disputes (No 06/NA) (17 December 2010) Art 52.
24 Amended Law on Civil Procedure (No 13/NA) (4 July 2012) Art 366.
25 Interview with Bounkhouang Thavisack, the Chief of Cabinet of the Supreme Court, on 22 June 2017.

law[26] for understanding how the court applies any of the criteria for recognition and enforcement. Nonetheless, these reporters consider it fair to conclude that the court will strictly scrutinise the criteria for recognition and enforcement and the petitioner has the burden to demonstrate they have satisfied all the criteria. It is unclear whether the court has the discretion to refuse to recognise and enforce a foreign judgment when all the criteria has been satisfied. In theory, the court could exercise its discretion by raising a specific issue to refuse recognition and enforcement citing the catchall provision of criterion (h) as the legal basis.

7 The criteria themselves are a mixture of legal and public policy considerations. The Lao court requires that the foreign judgment be truly final, and these reporters consider it likely that the Lao court would not accept matters that have any pending procedural or substantive appeals, including a preliminary, provisional or interlocutory judgment.

8 Lao law clearly disfavours recognising and enforcing a default judgment entered by a foreign tribunal for concerns related to proper jurisdiction and fairness issues.[27] Similarly, a Lao court will refuse to recognise or enforce a judgment that was decided by a foreign tribunal when the Lao court has jurisdiction to adjudicate the matter in the first place.[28] A Lao court will refuse recognition or enforcement where there

26 The code is the main source of law in the Lao People's Democratic Republic; however, as a matter of court practice, the court may consult other cases as guidance where the text of the law is unclear. These reporters, however, would not go so far as to say such cases provide precedential value in the way common law jurisdictions understand it.

27 Interview with Bounkhouang Thavisack, the Chief of Cabinet of the Supreme Court, on 22 June 2017.

28 See criterion (f) and Art 366 of the Amended Law on Civil Procedure (No 13/NA) (4 July 2012). These reporters understand this criterion to mean the Lao court or tribunal has exclusive jurisdiction in the matter regardless of whether the matter has commenced or been completed. However, as noted above, it is unclear to what extent, if at all, a Lao court could assert exclusive jurisdiction in a case in which the parties and assets are located in Laos, but the parties have selected another foreign court to adjudicate their dispute.

are no assets or property in the Lao PDR against which enforcement could be performed.[29]

9 Lastly, the LCP provides a catchall provision (criterion (h) above) to permit the court to consider other issues that do not fit neatly under the criteria when considering recognition and enforcement. In particular, criterion (h) could be interpreted to permit refusing recognition and enforcement for grounds of *res judicata* as specified under Article 45(3) of the Vietnam–Lao treaty and Article 21(1)(e) of the China–Lao treaty.

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29 Lao law is silent on foreign judgments which are non-monetary in nature and need not be enforced against the property/assets of the defendant. In theory, it appears to these reporters that the court could enforce a foreign non-monetary judgment against, *eg*, a person residing in Laos.

Country Report
MALAYSIA

Reporter: **Dr Choong Yeow Choy**
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A INTRODUCTION

1 As a general rule, a party who has obtained a judgment from any of the courts in a foreign country may seek recognition and enforcement of that foreign judgment in Malaysia. There are two regimes that govern this aspect of the law. The first is statutory and the other is at common law. The statutory scheme is administered through the Reciprocal Enforcement of Judgments Act 1958[1] ("REJA").

2 A party seeking recognition and enforcement of a foreign judgment will have to be mindful of two matters. Both these matters are of considerable importance. The first pertains to the jurisdiction in which the foreign judgment is obtained as this has a direct bearing on which of the two regimes referred to above will apply. The second concerns the nature of the foreign judgment. A foreign judgment may be *in personam* or *in rem*. A further categorisation draws a distinction between monetary and non-monetary judgments. The prospect of a party successfully obtaining recognition and enforcing a foreign judgment in Malaysia hinges in part on the nature of the judgment.

3 Part B of this report will address the first consideration.[2] This aspect is straightforward and uncontroversial. Part C will then proceed to consider the principles under which monetary foreign judgments *in personam* are recognised and enforced under the REJA and at common law.[3] A discourse on the grounds for rejecting the recognition and enforcement of such judgments will also be carried out in this part of the

1 Act 99.
2 See paras 4–6 below.
3 See paras 7–24 below.

report. This will be followed by a discussion of the principles governing the recognition and enforcement of non-monetary foreign judgments *in personam*, again both under the REJA and at common law, in Part D.[4] Part E will consider the rules which apply to foreign judgments *in rem*.[5] The discussions in Parts C, D and E are confined to judgments in civil and commercial matters. Finally, in Part F, this report will conclude with a number of additional observations relating to this aspect of the law.[6]

B THE APPLICABLE REGIME

4 As noted above, whether the REJA or the common law principles should be invoked by a party seeking recognition and enforcement of a foreign judgment depends on the jurisdiction in which the judgment was rendered.

5 The REJA is only applicable if a foreign judgment is from one of the seven jurisdictions listed in the First Schedule of the REJA. In view of the fact this report focuses only on the foreign judgments rendered by the courts in the ASEAN countries and from five additional countries, namely, Australia, China, India, Japan and South Korea, the REJA is only relevant for the purposes of this report if a judgment is from Singapore, Brunei Darussalam, India[7] or the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong SAR").[8]

6 While Singapore, Brunei Darussalam, Hong Kong SAR and India are recognised as reciprocating countries, there are two additional matters that must be underscored. First, only judgments from the superior courts

4 See paras 25–28 below.

5 See paras 29–33 below.

6 See paras 34–35 below.

7 The following states in India are excluded: State of Jammu and Kashmir, State of Manipur, Tribal areas of State of Assam, Scheduled areas of the States of Madras and Andhra: Reciprocal Enforcement of Judgments Act 1958 (Act 99) First Schedule.

8 In the case of China, judgments obtained from the courts in Mainland China can only be enforced by utilising the common law scheme but those judgments from the courts in Hong Kong SAR fall within the ambit of the Reciprocal Enforcement of Judgments Act 1958 (Act 99).

in these countries are and can be enforced pursuant to the REJA.[9] Therefore, judgments from the subordinate courts in a reciprocating country will still have to be enforced using the common law framework. Second, a party who has obtained a judgment to which the REJA applies from a superior court from one of the reciprocating countries has no option but to enforce the said judgment by invoking the REJA.[10] In other words, a foreign judgment to which the REJA applies can only be enforced through registration of the judgment under this regime.[11]

C RECOGNITION AND ENFORCEMENT OF FOREIGN MONETARY JUDGMENTS *IN PERSONAM*

7 Subject to the fulfilment of certain conditions and procedural requirements, all monetary foreign judgments *in personam* can be enforced in Malaysia. The following sub-parts will highlight and briefly discuss the applicable principles under both the REJA and common law regimes.

i *Position under the Reciprocal Enforcement of Judgments Act 1958*

8 The overarching objective of the REJA is primarily to assist parties who have obtained monetary judgments *in personam* from the superior courts in any of the reciprocating countries to register and enforce such foreign judgments.[12] Once registered, the foreign judgments may be enforced like any Malaysian judgment.[13]

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9 Reciprocal Enforcement of Judgments Act 1958 (Act 99) ss 3(1), 5(2)(c) and First Schedule. See also cases such as *Excelmore Trading Pte Ltd v Excelmore Classics Sdn Bhd* [1996] MLJU 64 and *Charles Priya Marie v Koshy Cherian* [2010] 6 CLJ 693, where judgments obtained in the former Subordinate Courts of Singapore were held to be not registerable under the Reciprocal Enforcement of Judgments Act 1958 (Act 99).

10 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 7.

11 See *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ 287 at 298 and *The Bank of East Asia Ltd Singapore Branch v Axis Incorporation Bhd* [2009] 5 CLJ 87.

12 See, *eg*, s 3(3) of the Reciprocal Enforcement of Judgments Act 1958 (Act 99).

13 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(2).

9 There are two distinct stages under this statutory framework. The first is the registration process and the second relates to the manner in which the registered judgment may be challenged. A judgment creditor seeking to register a foreign judgment must comply with a number of requirements. Conversely, a judgment debtor seeking to set aside the judgment that has been registered may rely on a number of established grounds.

10 However, whilst the requirements and grounds have been expressly codified, it is important to interpret and apply these provisions to the facts in a given case. This is where the courts play an important role. The need to understand the approach adopted by the courts in Malaysia in construing and relating these requirements and grounds to the cases before them is crucial. It appears from a survey of the reported decisions that the courts in Malaysia refer to cases from other jurisdictions such as Singapore and the UK for guidance when the requirements and grounds in the REJA are invoked and considered.

a Registration requirements

11 It has been noted that the foreign judgment must be one which emanates from a superior court in one of the reciprocating countries. In addition, the REJA imposes a limitation period of six years from the date of the judgment for the registration and enforcement of all foreign judgments.[14] Where there have been proceedings by way of appeal against the judgment, the limitation period starts from the date of the last judgment given in those proceedings.[15]

12 The foreign judgment must be one which is "final and conclusive as between the parties thereto".[16] Under the REJA, "a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts

14 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(1).
15 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(1).
16 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 3(3)(a).

of the country of the original court".[17] The question of when a judgment is regarded as final and conclusive has been deliberated by the courts in Malaysia. In *Santong Trading Pte Ltd v HJ Industries Sdn Bhd*[18] ("*Santong Trading*"), the High Court referred to a number of authorities from other jurisdictions on the proper meaning of the phrase "final and conclusive".[19] In this case, the High Court construed the term final as meaning, "final in the sense of admitting no further disputation".[20]

13 In *Santong Trading*, the High Court accepted the argument that if a judge had ordered that the costs of the proceedings be costs in the cause, this would denote that the matter had not been conclusively decided as between the parties.[21] In cases where the foreign judgment allows the parties the liberty to apply to vary the judgment should there be any material change in circumstances, it cannot be said that the judgment is final and conclusive.[22] A foreign default judgment is considered as "final and conclusive".[23] Ultimately the question of whether a judgment is to be regarded as final and conclusive is dependent on the factual matrix of the case.

17 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 3(4). The phrase "notwithstanding that an appeal may be pending" in s 3(4) has not been considered by the courts in Malaysia.

18 [1996] 3 CLJ 954.

19 *Eg*, in *Re Riddell, Ex parte Strathmore (Earl)* (1888) 20 QBD 512 at 517, Fry LJ said that "[n]othing can be a final judgment by which there is not a final and conclusive adjudication between the parties of the matters in controversy in the action". In *Selbel & Day v Cumins* [1922] 16 SLR 405 at 412, the court held that "a judgment is final when it does, if allowed to stand, finally dispose of the right of the parties". The third case referred to by the High Court was *Ramchand Manjunal v Goverhamdas Ratanchand* LR 47 Ind App 124 where it was held that an order is not a final order unless it has the effect of finally disposing the rights of the parties.

20 *Santong Trading Pte Ltd v HJ Industries Sdn Bhd* [1996] 3 CLJ 954 at 960.

21 *Santong Trading Pte Ltd v HJ Industries Sdn Bhd* [1996] 3 CLJ 954 at 962.

22 *Charles Priya Marie v Koshy Cherian* [2010] 6 CLJ 693 at 703–704.

23 *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ 287. Be that as it may, it is submitted that the default judgment must be a final default judgment (arising from a claim for liquidated damages), as opposed to an interlocutory default judgment (arising from a claim for unliquidated damages). It is this reporter's view that interlocutory judgments in general should not be regarded as "final and conclusive".

14 The REJA further provides that the registration of the judgment may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had, prior to the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter.[24]

15 While there is a requirement that the foreign judgment must be for a sum of money, it must not be a sum payable "in respect of taxes or other charges of a like nature or in respect of a fine or other penalty".[25] Interest on a judgment is enforceable.[26]

16 The REJA expressly prohibits the registration of foreign judgments that have been wholly satisfied[27] or those that could not be enforced by execution in the country of the original court because it is not entitled to enforcement.[28] In the event that a foreign judgment sum has been partly satisfied at the date of the application for registration of the judgment of the original court, registration may still be carried out but this must only be in respect of the balance remaining payable at the date of registration.[29]

b Grounds to set aside

17 Even if a foreign judgment has been registered, it may still be set aside. However, the onus is on the party against whom a registered

24 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(b). See *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ 287.

25 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 3(3)(b). In *Commerzbank (South East Asia Ltd) v Tow Kong Liang* [2011] 3 CLJ 127, the Court of Appeal disallowed the application to set aside a registered judgment on this ground.

26 *Saeed U Khan v Lee Kok Hooi* [2001] 5 MLJ 416.

27 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(1)(a).

28 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(1)(b). The ambit of this provision was explained by the High Court in *Standard Chartered Bank (Singapore) Ltd v Pioneer Smith (M) Sdn Bhd* [2015] 7 CLJ 677.

29 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 4(4). This provision was successfully invoked by the judgment debtor to set aside a registered foreign judgment in *Malayan Banking Bhd v Paxellent Corp Bhd* [2007] 3 CLJ 247 and *Hong Leong Finance Ltd v Liow Hock Seng* [1996] 1 CLJ 462.

judgment may be enforced[30] to prove to the satisfaction of the registering court that: (a) the judgment was not a judgment to which the REJA applies or was registered in contravention of the REJA;[31] or (b) the courts of the country of the original court had no jurisdiction in the circumstances of the case;[32] or (c) the judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;[33] or (d) the judgment was obtained by fraud;[34] or (e) the enforcement of the judgment would be contrary to public policy in Malaysia;[35] or (f) the rights under the judgment are not vested in the person by whom the application for registration was made.[36] If any of these six grounds is successfully invoked, the registered judgment must be set aside.

30 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1).

31 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(a)(i).

32 Reciprocal Enforcement of Judgments Act 1958 (Act 99) ss 5(1)(a)(ii), 5(2) and 5(3). Attempts by the judgment debtors to set aside the registered judgments under this ground proved unsuccessful in *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435; *Vitclay Pipes Pty Ltd v Syarikat Vitco (M) Sdn Bhd* [1993] 4 CLJ 300 and *Rowlinson Garden Products Ltd v World Zone (M) Sdn Bhd* [2010] MLJU 541.

33 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(a)(iii). This provision was successfully invoked by the judgment debtor to set aside a registered foreign judgment in *Hong Leong Finance Ltd v Liow Hock Seng* [1996] 1 CLJ 462. In *Commerzbank (South East Asia Ltd) v Tow Kong Liang* [2011] 3 CLJ 127, the Court of Appeal disallowed the application to set aside a registered judgment on this ground.

34 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(a)(iv). In *Bank of India Krishna Kumar s/o Triyugi Narain Sharma* [1994] 3 CLJ 294, reference was made to the English case of *Syal v Heyward* [1948] 2 KB 443 where it was held that the fraud to be established must be a fraud on the foreign court pronouncing the judgment. In this case, since the appellant had taken full advantage of the proceedings in Singapore before the judgment in Singapore was delivered, the High Court came to the conclusion that there was therefore "no fraud of the Singapore Court": *Bank of India Krishna Kumar s/o Triyugi Narain Sharma* [1994] 3 CLJ 294 at 296. As far as this reporter is aware, the courts of Malaysia have drawn no distinction between different forms of fraud, *eg*, extrinsic and intrinsic fraud.

35 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(a)(v).

36 Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 5(1)(a)(vi).

18 In respect of the six grounds mandating the setting aside of a registered judgment, two of these grounds necessitate further elaboration. The first pertains to the question of whether the court of origin had jurisdiction and the second relates to the concept of public policy.

19 In determining the issue of whether the court of origin had jurisdiction in the circumstances of the case, the courts in Malaysia have not conclusively decided if this issue is to be assessed according to the law of the court of origin or Malaysian law. The Court of Appeal in *Ngan Chin Wen v Panin International Credit (S) Pte Ltd*[37] acknowledged the existence of conflicting authorities. The majority decision of the Court of Appeal favoured the position that the issue of whether the court of origin had jurisdiction is to be evaluated based on Malaysian law. The dissenting judgment took the position that the issue of whether the court of origin had jurisdiction is to be determined by applying the law of the court of origin.

20 The nebulous concept of public policy may prove to be the spanner in the works for a judgment creditor seeking to enforce a foreign judgment. This ground has often been relied on by a judgment debtor seeking to set aside a registered judgment.[38] However, the reported judgments indicate that the proverbial "unruly horse" has been kept under control. In *Ritz Hotel Casino Ltd v Datuk Seri Osu Haji Sukam*,[39] the enforcement of a foreign judgment based on a gambling debt was refused on the ground that the enforcement of the said judgment would be contrary to public policy in Malaysia. What was striking was the reliance by the High Court on a number of extra-legal sources as authority in determining the public policy of Malaysia. This decision was subsequently overturned by the Court of Appeal and two recent cases, namely *Resorts World at Sentosa Pte Ltd v Lim Soo Kok*[40] and *Marina Bay*

37 [2003] 3 MLJ 279.

38 See, *eg*, *Commerzbank (South East Asia) Ltd v Dennis Ling Li Kuang* [2000] 2 CLJ 57; *Banque Nasionale De Paris v Wuan Swee May* [2000] 4 CLJ 387; *Tow Kong Liang v Nomura Singapore Ltd* [2005] 1 CLJ 103; *Chan Hak Foon v Sutera Harbour Sdn Bhd* [2010] 9 CLJ 995 and *Commerzbank (South East Asia Ltd) v Tow Kong Liang* [2011] 3 CLJ 127.

39 [2005] 6 MLJ 760.

40 [2017] 1 CLJ 363.

Sands Pte Ltd v Ng Kong Seong[41] have confirmed that the enforcement of a foreign judgment based on a gambling debt is not contrary to the public policy of Malaysia. As explained by the High Court in the first of the two cases, "the judgment creditor is availing itself to the right of reciprocity of registering a valid and lawful judgment of a foreign court as expressly provided under REJA".[42]

c Matters excluded from the Reciprocal Enforcement of Judgments Act 1958

21 Section 2 of the REJA expressly provides that an "action *in personam*" shall not be deemed to include "any matrimonial cause or any proceedings in connection with any matrimonial matters, administration of the estates of deceased persons, bankruptcy, winding up of companies, lunacy or guardianship of infants".

ii *Position at common law*

22 In contrast to the above statutory scheme, a judgment creditor who wishes to enforce a monetary foreign judgment at common law will have to commence a fresh action.[43] This fresh action is founded on the cause of action for a debt that has accrued and is payable based on the judgment rendered in the foreign court. This obligation to pay the debt is separate from the original cause of action in the foreign court of origin. In this respect, enforcement of monetary foreign judgments at common law is more cumbersome than under the REJA. As detailed above, under the REJA, a simplified mechanism for recognition and enforcement has

41 [2017] 7 MLJ 188.

42 *Resorts World at Sentosa Pte Ltd v Lim Soo Kok* [2017] 1 CLJ 363 at [13]. Decisions rendered outside the context of the Reciprocal Enforcement of Judgments Act 1958 (Act 99) may shed further light on how the public policy ground may be interpreted by the courts. In the context of enforcement of foreign arbitral awards, see *Sami Mousawi v Kerajaan Negeri Sarawak* [2004] 2 MLJ 414; *Equitas Ltd v Allianz General Insurance Co (Malaysia) Bhd* [2009] MLJU 1334 and *Harris Adacom Corp v Perkom Sdn Bhd* [1994] 3 MLJ 504.

43 See, *eg*, *CBM Construction Sdn Bhd v Builtcon and Development Sdn Bhd* [1999] MLJU 71 at 7; *Swee Hua Daily News Bhd v Tan Thein Chin* [1996] 2 MLJ 107 and *Charles Priya Marie v Koshy Cherian* [2010] 6 CLJ 693 at [38].

been established and it obviates the necessity of having to first obtain a local judgment.

23 One advantage that a judgment creditor enjoys at common law is that the judgment sought to be enforced need not be one that emanates from a superior court of the country of origin.[44]

24 However, despite the above differences between the regimes, there are two striking resemblances. First, the requirements for registration under the statutory regime are, by and large, similar to those for the enforcement by an action at common law. Second, the common law grounds for refusal of recognition and enforcement mirror those under the statutory scheme.[45] This is unsurprising as the latter is a codification of the common law principles. In this respect, the cases discussed above will apply with equal force when one considers the requirements for maintaining an action to enforce a foreign judgment and the grounds to challenge the enforcement of such a judgment at common law.[46]

D RECOGNITION AND ENFORCEMENT OF NON-MONETARY FOREIGN JUDGMENTS *IN PERSONAM*

25 The question of whether a non-monetary foreign judgment *in personam* such as an order for specific performance or an injunction may be enforced in Malaysia is not as clear cut as in the case involving a monetary foreign judgment *in personam*.

44 *Excelmore Trading Pte Ltd v Excelmore Classics Sdn Bhd* [1996] MLJU 64; *Charles Priya Marie v Koshy Cherian* [2010] 6 CLJ 693.

45 There is no authority on whether defences, such as mistake, res judicata and breach of a jurisdiction agreement, are available at common law. Note that these defences, apart from *res judicata* (which has been considered in a few cases under the Reciprocal Enforcement of Judgments Act 1958 (Act 99) ("REJA") including *Loo Chooi Ting v United Overseas Bank Ltd* [2015] 8 CLJ), are also absent from the REJA.

46 For cases involving the enforcement of monetary foreign judgments *in personam* at common law, see *Swee Hua Daily News Bhd v Tan Thein Chin* [1996] 2 MLJ 107 and *Meinhardt Singapore Pte Ltd v Teo A Khing Design Consultants Sdn Bhd* [2016] MLJU 532.

i *Position under the Reciprocal Enforcement of Judgments Act 1958*

26 The REJA clearly excludes the enforcement of non-monetary foreign judgments. Section 2 of the REJA defines and limits judgments capable of enforcement to those "for the payment of a sum of money". In this regard, the jurisdiction from where the non-monetary foreign judgment emanates from is irrelevant. Therefore, a party seeking to enforce a non-monetary foreign judgment will have no choice but to look to the position at common law.

ii *Position at common law*

27 To date, there has been no reported decision in Malaysia that has dealt with the issue of enforcement of a non-monetary foreign judgment at common law. This is not surprising as the conventional approach under the common law is to disallow the enforcement of non-monetary foreign judgments. However, this does not mean that an attempt could not be made to persuade the courts in Malaysia to re-assess the traditional approach. Indeed, there have been calls by commentators to re-evaluate this aspect of the law.[47]

28 In relation to a *Mareva* injunction, for example, it has now been recognised that this equitable remedy is appropriate and a necessity in the context of modern-day realities. The courts in a number of jurisdictions have demonstrated their willingness to consider and grant a *Mareva* injunction even though the assets or account to be frozen are outside their jurisdictions.[48] In *Metrowangsa Asset Management Sdn Bhd v Ahmad bin Hj Hassan*,[49] the High Court in no uncertain terms said that "there

47 See, *eg*, Choong Yeow Choy, "Enforcement of Foreign Judgments: The Role of the Courts in Promoting (or Impeding) Global Business" [2007] 30 *World Academy of Science, Engineering and Technology* 92 and Kim Pham, "Enforcement of Non-Monetary Foreign Judgments in Australia" [2008] 30 *Sydney Law Review* 663.

48 See, *eg*, *Babanaft International Co SA v Bassatne* [1989] 2 WLR 232; *Republic of Haiti v Duvalier* [1990] 1 QB 202; [1989] 1 All ER 456 and *Crédit Suisse Fides Trust SA v Cuoghi* [1998] QB 818; [1997] 3 All ER 724.

49 [2005] 1 MLJ 654.

was nothing to prevent this court from granting a worldwide *Mareva* in favour of the plaintiffs".[50] That said, it remains to be seen if such a worldwide *Mareva* injunction, which is granted by a foreign court, will be recognised and enforced in Malaysia.

E RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS *IN REM*

29 Reference to an action *in rem* is found in section 5(2)(b) of the REJA. For a foreign judgment *in rem* to be recognised in Malaysia, there is a requirement that the property which was the subject matter of the proceedings must be situated in the country of the court exercising original jurisdiction over the matter. Section 5(3)(a) of the REJA further provides that "the courts of the country of the original court shall not be deemed to have had jurisdiction if the subject matter of the proceedings was immovable property outside the country of the original court".[51]

30 In relation to the enforceability of a foreign judgment *in rem*, it is submitted by this reporter that the provision envisages a judgment or order for the payment of a sum of money being made in an action *in rem*. In other words, there must be a monetary element in that judgment. Such a conclusion has been implied by this reporter from a reading of the interpretation imputed to the term "judgment" in section 2 of the REJA.[52]

31 In this regard, the distinction between recognition and enforcement is important and must be appreciated when one considers a case involving a foreign judgment *in rem*.

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50 *Metrowangsa Asset Management Sdn Bhd v Ahmad bin Hj Hassan* [2005] 1 MLJ 654 at 34.

51 The High Court in *Charles Priya Marie v Koshy Cherian* [2010] 6 CLJ 693 made reference to this provision and held that the Reciprocal Enforcement of Judgments Act 1958 (Act 99) had no application as the property in question was outside the country of the original court.

52 The term "judgment" is defined as "a judgment or order given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party": Reciprocal Enforcement of Judgments Act 1958 (Act 99) s 2.

32 This reporter considers that the same grounds of refusal set out above for foreign judgments *in personam* should also apply for judgments *in rem*.

33 To this reporter's knowledge, there is no substantial authority of the recognition and enforcement of foreign judgments *in rem* at common law.

F CONCLUSION

34 It must be noted that the reciprocating countries listed in the REJA are subject to change. This is expressly provided in sections 3(2) and 9 of the REJA. To date, there have been two substantive changes.[53] While it may be more efficacious for a party seeking recognition and enforcement of a foreign judgment to proceed under the REJA, arguably there is no significant undue disadvantage to those who are required to seek recognition and enforcement of a foreign judgment at common law. As far as the applicable principles for this aspect of the law are concerned, the rules and principles are almost identical under both regimes. This is a welcome state of affairs as the fact of the matter is that the applicable scope of the REJA is quite narrow and thus, enforcement of a foreign judgment at common law may be the only available route.

35 The written laws and the common law principles are important when one considers the law relating to the recognition and enforcement of foreign judgments. However, equally important is how the courts approach the issue, interpret the provisions in the statute and apply the laws and principles. By and large, the cases in Malaysia have demonstrated a liberal attitude towards the recognition and enforcement of monetary foreign judgments.

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53 In 1994, vide the Reciprocal Enforcement of Judgments (Application of Section 9) Order 1994 (PU (A) 73/1994), Australia was removed from the list of reciprocating countries. In 2000, vide the Reciprocal Enforcement of Judgments (Extension of Part II) Order 2000 (PU (A) 122/2000), Brunei Darussalam was added as a reciprocating country.

Country Report
MYANMAR

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A INTRODUCTION

1 Once a province of British India, Myanmar's legal system is established on common law principles and pieces of legislation introduced by the British. Upon obtaining its independence in 1948, Burma (as it was then known) retained much of the laws that were then in existence in the form of the Burma Code, which can loosely be described as a codification of the then-prevailing common law at the time. The legal system in Myanmar today has since built upon this heritage and is primarily a common law system, albeit heavily modified, throughout the years, by the various political regimes.

2 As a common law jurisdiction, and as a matter of principle, a Myanmar court would recognise the choice of law clause in a binding commercial agreement. It is worth noting that while the Myanmar courts will recognise the choice of law and choice of forum clauses in an agreement (and accordingly, this reporter considers that Myanmar courts would refuse to recognise and enforce a foreign judgment if it was rendered in breach of a choice of court agreement), section 28 of the Contract Act (1872) renders void any provision that seeks to restrain a party from enforcing his rights "under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals".

B ENFORCEMENT OF FOREIGN JUDGMENTS

3 Myanmar is not party to any bilateral or multilateral agreement or convention on the enforcement of foreign judgments and a person

seeking to enforce a foreign judgment would have to rely on the Civil Procedure Code (1908) ("CPC"),[1] and its rather dated and archaic rules and procedures, to do so. However, Myanmar is party to the New York Convention,[2] which could make arbitral awards easier to enforce in Myanmar than judgments.

4 The CPC provides the mechanism for the enforcement of foreign judgments. In particular, section 44A of the CPC provides that where "a certified copy of a decree of any of the superior courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [Myanmar] as if it had been passed by the District Court". A foreign state would be considered to be a "reciprocating territory" for purposes of this section, if so declared by the president of Myanmar by notification in the gazette. As far as this reporter is aware, no foreign state has been so declared a "reciprocating territory" and this section in the CPC would, practically speaking, therefore not apply with respect to the enforcement of foreign judgments in Myanmar today.

5 That being said, section 13 of the CPC makes provision for foreign judgments (regardless of whether they are of a court of a reciprocating territory or otherwise) stating that:

> [A] foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except:
> (a) where it has not been pronounced by a court of competent jurisdiction;
> (b) where it has not been given on the merits of the case;
> (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Myanmar in which such law is applicable;
> (d) where the proceedings in which the judgment was obtained are opposed to natural justice;
> (e) where it has been obtained by fraud;
> (f) where it sustains a claim founded on a breach of any law in force in Myanmar.

1 Found in Pt XXVIII of the Burma Code vol 12.

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

6 The effect of section 13 of the CPC is that a Myanmar court would, in principle, pass a decree in favour of a plaintiff claiming enforcement of a foreign judgment unless it finds that the judgment is inoperative by reason of one or more of the circumstances specified in section 13 as described above.

7 This reporter notes that there have not been many instances of foreign judgements being enforced in Myanmar in recent history. As such, the analysis in this report would largely be theoretical and based on common law principles. Of the reported cases reviewed, the majority involved judgments from India. This is to be expected due to the strong political and economic ties that were established during the colonial era. The courts of India and of Myanmar would have, at that time, shared strong similarities as a result of their shared origin. As such, there is little evidence as to how a Myanmar court would analyse a judgment from a jurisdiction that is vastly different (such as a civil law jurisdiction).

C GENERAL PROCEDURE

8 A person seeking to enforce a foreign judgment in Myanmar must file a suit in Myanmar, as plaintiff, against the judgment-debtor, as defendant. There is no specific procedure for a suit brought on a foreign judgment and the suit would, as with all other suits, be initiated by presenting a plaint. Such suit must be filed within six years from the date of the foreign judgment in accordance with Article 117 of the First Schedule of the Limitation Act of 1908.

9 A Myanmar court must, in order to enforce a foreign judgment, have jurisdiction to do so. In general, every court in Myanmar has jurisdiction in granting enforcement of a foreign judgment, subject to certain pecuniary limits of its jurisdiction. In addition to such pecuniary limits,[3] the Myanmar courts must have jurisdiction over the defendant or the cause of action as required by section 20 of the CPC. This requires that (a) the judgment-debtor (against whom the judgment is to be

3 Pecuniary limits of Myanmar courts: Township Courts up to MMK10m, District Courts up to MMK100m and no limits apply to the High Courts and Supreme Court.

enforced) must, at the time of commencement of the suit, be resident, or must have carried on business or personally worked for gain in Myanmar, or (b) the foreign judgment must be obtained based on a cause of action that arose wholly or partly in Myanmar.

10 The form of plaint for a foreign judgment[4] requires the plaintiff to set out a specific amount due from the defendant. This suggests that the Myanmar courts would only enforce monetary judgments, at least from a procedural perspective, and that judgments relating to injunctions, including foreign asset freezing orders and specific performance, would not be enforced. The ruling in the case of *K B Walker v Gladys B Walker*[5] ("*Walker v Walker*") states that:

> [I]n order to establish that a final and conclusive judgement had been pronounced, it must be shown that in the court by which it was pronounced it finally, conclusive and for ever established the existence of *the debt* of which it is sought to make conclusive evidence in [Myanmar] so as to make it *res judicata* between the parties. [emphasis in original]

11 As such, only monetary judgments would be enforced and it therefore follows that foreign judgments *in rem* would not be enforceable in Myanmar. In particular, pursuant to section 16 of the CPC, Myanmar law requires that all cases involving immovable property in Myanmar be instituted domestically in Myanmar.

12 The case *Walker v Walker* also underscores the requirement that the case be "conclusive" or "*res judicata*".[6] As such, foreign interlocutory

4 Set out in Form No 11 of Appendix A to the First Schedule of the Civil Procedure Code (1908).

5 AIR (1935) Ran 284 at 285 C1, [6]. As far as the author of this report is aware, there is no case law relating to whether interest on a judgment is enforceable or whether a judgment on a foreign penal, revenue or other public law is enforceable.

6 As far as this reporter is aware, there is no case law relating to whether the Myanmar courts would refuse to recognise and enforce a foreign judgment because it conflicts with a Myanmar judgment or what the Myanmar courts would do if faced with two conflicting judgments.

judgments or foreign judgments pending the final decision on the merits would not be enforceable.[7]

13 The expected length of time to enforce a foreign judgment (*ie*, for the judgment-creditor to obtain a decree enforcing the foreign judgment) is approximately 12 to 18 months, provided there are no unusual delays and all documents have been properly submitted. However, due to the political and economic circumstances in Myanmar over the last 40 years, foreign judgments are not generally enforced in Myanmar, and the expected length of time may vary. This is also a result of the pace of the judicial system in Myanmar, where one can expect the court processes to take considerable periods of time.

14 Assuming the Myanmar court in which the plaint to enforce a foreign judgment has been initiated has jurisdiction to enforce the same, the enforceability of such foreign judgment would hinge on no objection being successfully raised pursuant to section 13 of the CPC. This report considers some of the available case law on this section.

D COURT OF COMPETENT JURISDICTION

15 A foreign judgment will not be enforced if it is found that the foreign court issuing such judgment is lacking jurisdiction. Whether a foreign court is of competent jurisdiction is a matter to be determined by the Myanmar courts according to the law in Myanmar, and not by the rules of the foreign court. Section 14 of the CPC provides that:

> [T]he Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

7 Although, as far as this reporter is aware, there is no case law relating to whether a foreign judgment appealable to a higher court in the foreign jurisdiction could be considered a "conclusive" judgment; this is the case in most common law countries and this reporter considers Myanmar courts would adopt the same position.

16 As such, and in filing a plaint in the Myanmar courts to enforce a foreign judgment, a certified copy of the foreign judgment must be produced in support of the above-mentioned presumption. The burden is, by virtue of section 14 of the CPC, shifted to the defendant to rebut the presumption that the foreign court has competent jurisdiction.

17 Case law in Myanmar indicates that a foreign court would have competent jurisdiction where relevant parties had agreed to submit to the same:

(a) the case of *Steel Brothers & Co Ltd v Y A Ganny Sons and Two*[8] determined that if a foreign court and a Myanmar court are competent to try a suit, it is open to the parties to a contract to agree that disputes in respect thereof should be adjudicated upon by one of them and such agreement is perfectly legal; and

(b) the case of *V A S Arogya Odeyar v VR RM N S Sathappa Chettiar*[9] determined that if a defendant was served with process by a foreign court and he appeared and contested the suit on merit and also questioned the jurisdiction of the court, such appearance would be considered submission to the jurisdiction of the court. Once the suit is decided on merits, he cannot challenge the decision on the ground of want of jurisdiction.

E MERITS OF THE CASE

18 The case of *S P S N Kasivisvanathan Chettiar v S S Krishnappa Chettiar*[10] ("*Kasivisvanathan v Krishnappa*") sets out the general principle that "a court which entertains a suit on a foreign judgement cannot institute an enquiry into the merits of the original action, or the propriety of the decision".[11] As such, the Myanmar courts would not examine the substantive merits of the judgment of a foreign court.

8 (1965) BLR (CC) 449.

9 (1951) BLR (HC) 211.

10 (1951) BLR (HC) 399 at 399, [3] and at 403, [2].

11 See also *Baijnath Karnani v Vallabhadas Damani* AIR (1932) Mad 661; *Brijial Ramjidass v Govindram Gorhandas Seksaria* AIR (34) (1947) PC 192 and *Ganga Prasad v Ganesh Lal* 56 All 119.

19 This would be the case even if it appears that the courts did not examine the merits closely as exemplified in the ruling in *Saraswati v Manikram Balabux Bajaj BLR*,[12] where it was held that the decision of the High Court of Jaipur was to be deemed to have been given on the merits of the case, notwithstanding that it was disposed of "in a few words". As such, this reporter expects the Myanmar courts to refuse to enforce a foreign judgment due to an error of fact and/or law.

20 Myanmar case law, however, has resulted in differing conclusions with respect to *ex parte* rulings, as described below:

(a) The ruling in *C Burn v D T Keymer*[13] ("*Burn v Keymer*") decided that a foreign judgment by a court of competent jurisdiction, even if pronounced *ex parte*, is binding on a Myanmar court if the defendant, though given an opportunity to appear and defend, declined to do so. However, the foreign judgment must be passed after consideration of the evidence. The digest entry of this case indicates that the defendant had failed to appear at the hearing, notwithstanding having entered an appearance in the matter. In this case, the judge held that "a defendant cannot avoid the application of *res judicata* by saying that he did not appear at the trial … and the plaintiff who has an *ex parte* decree … cannot be deprived the full benefit of the decree which has obtained by the fact that the defendant did not appear in court to protect his own interest".[14]

(b) However, the later ruling in *A N Abdul Rahiman v J M Mahomed Ali Rowther*[15] ("*Rahiman v Rowther*") did not uphold a foreign *ex parte* judgment on the following grounds:

  (i) In this case, the defendant refused to accept service in Yangon of the summons issued by the Singapore court, and subsequently did not appear in the Singapore court or take any action.

  (ii) The judge in this case stated that "a decision on the merits involves the application of the mind of the Court to the

12 (1956) HC 316.

13 (1913) 7 LBR 56.

14 *Sreehari Bukshes v Gopal Chunder Samuel* 15 WR 500 at [4].

15 (1928) 6 ILR 552.

truth or falsity of the plaintiff's case and therefore, though a judgement passed after a judicial consideration of the matter by taking evidence may be a decision on the merits even though passed *ex parte*, a decision passed without evidence of any kind cannot be held to be a decision on the merits".

(iii) The ruling was that if a judgment was entered as a matter of course in favour of the plaintiff on the pleadings without the plaintiff being called upon to prove his case, such an *ex parte* decision passed without evidence is not considered a judgment on the merits within the meaning of section 13(b) of the CPC, and therefore the plaintiff's suit would fail.

(c) As such, what is key is that the foreign judgment, while *ex parte*, is passed on a consideration of the evidence at hand.

(d) A further point of interest with respect to these two cases is that in *Burn v Keymer*, the defendant had in fact entered an appearance and thereby submitted to the jurisdiction of the foreign court. In *Rahiman v Rowther*, however, the defendant had not submitted to the jurisdiction of the foreign court and subsequently did not appear in court or take any action. This may have been another distinguishing factor between how the cases were decided.

F RECIPROCITY

21 Section 13(c) of the CPC enshrines the principle of reciprocity whereby a Myanmar court will not recognise a foreign judgment where, on the face of the proceedings, the foreign court has refused to recognise Myanmar law in cases where it would be applicable. The case of *Kasivisvanathan v Krishnappa* makes an oblique reference to a ruling laid down by a Bench of the Allahabad High Court that "where a foreign court merely applies its own law of Limitation in respect of a matter before that Court, [it] cannot be said to have refused to recognise the law of India simply because the law of Limitation may be different in the two

countries".[16] This reporter expects a similar principle would be adopted in Myanmar.

22 The same section also provides that a foreign judgment would not be enforceable in Myanmar if it appears on the face of the proceedings to be founded on an incorrect view of international law.

G NATURAL JUSTICE

23 Section 13(d) of the CPC requires that the foreign court had adhered to what is expected to be universally accepted principles of "natural justice". Unfortunately, this reporter was unable to find case law relating to the application of this section.

H FRAUD

24 Section 13(e) of the CPC provides that a judgment obtained as a result of fraudulent behaviour by one of the parties would not be conclusive for purposes of enforcement in Myanmar. In the absence of case law in Myanmar, it is not clear if section 13(e) is limited to fraud relating to the proceedings resulting in the foreign judgment, or if it would enable a Myanmar court to consider evidence of fraud that was brought before the foreign court and dismissed, thereby rendering such evidence part of the "merits of the case" (the substance of which are not to be examined under Myanmar case law as discussed above).

I BREACH OF MYANMAR LAW

25 Section 13(f) of the CPC provides that a judgment would not be conclusive if the claim is founded on a breach of any law in force in Myanmar. It is not clear if this provision would extend to judgments which claim is founded not on a breach of express written legislation in force in Myanmar, but instead on a breach of unwritten policies. This is

16 *S P S N Kasivisvanathan Chettiar v S S Krishnappa Chettiar* (1951) BLR (HC) 399 at 403, [1], referring to *Ganga Prasad v Ganesh Lal* 56 All 119.

of particular relevance in Myanmar as there are unwritten policies implemented by the Myanmar authorities that may impact on foreign investments in Myanmar.

Country Report
REPUBLIC OF THE PHILIPPINES

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A RECOGNITION AND ENFORCEMENT UNDER TREATY

1 Discussions on judicial jurisdiction refer to either direct jurisdiction of the rendering court or indirect jurisdiction of the recognising court. The former is called *compétence directe* since only the court before which a case is filed decides, in the first place, that it can and should exercise jurisdiction. In contrast, indirect jurisdiction or *compétence indirecte* pertains to a decision that must be made by the court to whom the request for recognition is made.[1]

2 The Philippines is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention. Aside from this, there is no other treaty in respect of the recognition and enforcement of foreign judgments to which the Philippines is a party. However, the Philippines' Rules of Court[2] provide that a foreign judgment may be recognised and enforced in the Philippines through an independent action.[3] Section 48 of rule 39 provides:

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1 Ralf Michaels, "Some Fundamental Jurisdictional Conceptions as Applied in Judgment Convention" in *Conflict of Laws in a Globalizing World: A Tribute to Arthur von Mehren* (Eckart Gottschalk *et al* eds) (Cambridge University Press, 2007).

2 Rules of Civil Procedure (Bar Matter No 803 (1997)).

3 *BPI v Guevara* GR No 167052 (11 March 2015) and *Hung Lung Bank, Ltd v Saulog* GR No 73765 (26 August 1991). A judgment or final order of a foreign court cannot be enforced simply by execution. A foreign judgment or order merely creates a right of action, the non-satisfaction of which is the cause of action by which a suit can be brought in the Philippines for its enforcement. An action for the enforcement of a foreign judgment or final order in the Philippines is governed by section 48 of rule 39 of the Rules of Civil Procedure (Bar Matter

(*continued on the next page*)

> **Effect of foreign judgments or final orders.**
>
> The effect of a judgment or final order of a tribunal of a foreign country, having jurisdiction to render the judgment or final order is as follows:
>
> (a) In case of a judgment or final order upon a specific thing, the judgment or final order is conclusive upon the title to the thing; and
> (b) In case of a judgment or final order against a person, the judgment or final order is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title.
>
> In either case, the judgment or final order may be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

3 While the above rule provides that foreign judgments, may generally be recognised and enforced, if there is evidence of a lack of jurisdiction, absence of notice, collusion, fraud or clear mistake of law or fact or if it is found to be contrary to the laws, customs or public policy of the Philippines,[4] the court may refuse its recognition and enforcement. However, there is a disputable presumption that "a court, or judge acting as such, whether in the Philippines or elsewhere, was acting in the lawful exercise of jurisdiction".[5]

4 In recognising and enforcing foreign judgments, Philippine courts can only consider them as facts which must be proven according to the Rules of Evidence.[6] The Philippine courts cannot, *motu proprio*, take judicial notice of the foreign judgments. Rather, compliance with section 24 of rule 132 is required:

> The *record of public documents referred to in paragraph (a) of Section 19, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody* of the record, or by

No 803 (1997)). An action for recognition of a foreign judgment is thus also an action for enforcement of the foreign judgment.

4 Article 17 of the Civil Code of the Philippines (Republic Act No 386 (1949)) provides that "[p]rohibitive laws concerning persons, their acts or property, and those which have for their object public order, public policy and good customs shall not be rendered ineffective by laws or judgments, or by determinations or conversations agreed on in a foreign judgment".

5 Revised Rules of Evidence (adopted on 14 March 1989) r 131, s 3(n).

6 Revised Rules on Evidence (adopted on 14 March 1989).

> his deputy, and accompanied, if the record is not kept in the Philippines, with a certificate that such officer has the custody. If the office in which the record is kept is in foreign country, the certificate may be made by a secretary of the embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the Philippines stationed in the foreign country in which the record is kept, and authenticated by the seal of his office. [emphasis added]

5 As discussed in *Corpuz v Tomas*,[7]

> [T]he starting point in any recognition of a foreign … judgment is the acknowledgment that our Courts do not take judicial notice of foreign judgments and laws. As a rule, no sovereign is bound to give effect to a judgment rendered by a tribunal of another country. This means that the foreign judgment and its authenticity must be proven as facts under our rules on evidence, together with the alien's applicable national law to show the effect of the judgment on the alien himself or herself. This may be made in an action instituted specifically for the purpose or in another action where a party invokes the foreign decree as an integral aspect of his claim or defense.

6 For a foreign judgment to be recognised and enforced in the Philippine jurisdiction, one must bring it before the courts in a civil action and prove the authenticity and validity of such foreign judgment together with the laws and jurisprudence under which the foreign judgment was rendered.[8] Should there be a failure in proving the foreign procedural law, the doctrine of processual presumption will apply – where a foreign law is not properly pleaded or proven, the presumption is that that foreign law is the same as forum law.[9]

7 One of the underlying principles allowing for recognition and enforcement revolves around the principle of comity founded on mutuality and reciprocity. In *St Aviation Services v Grand International*

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7 GR No 186571 (11 August 2010).

8 For the avoidance of doubt, the Philippine courts do not review the merits of the case: Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 533.

9 *EDI-Staffbuilders Intl v NLRC* GR No 145587 (26 October 2007) 537 SCRA 409 at 430.

Airways[10] ("*St Aviation Services*"), the court said that "under the rules of comity,[11] utility and convenience, nations have established a usage among civilised states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries".

8 The case of *Mijares v Ranada*[12] enunciated another theoretical underpinning for recognition and enforcement of foreign judgments in general:

> There is no obligatory rule derived from treaties or conventions that requires the Philippines to recognise foreign judgments, or allow a procedure for the enforcement thereof. However, *generally accepted principles of international law, by virtue of the incorporation clause of the Constitution, form part of the laws of the land even if they do not derive from treaty obligations*. The classical formulation in international law sees those customary rules accepted as binding result from the combination of two elements: the established, widespread, and consistent practice on the part of States; and a psychological element known as the opinion *juris sive* necessitates (opinion as to law or necessity) …
>
> *While the definite conceptual parameters of the recognition and enforcement of foreign judgments have not been authoritatively established, the Court can assert with certainty that such an undertaking is among those generally accepted principles of international law*. As earlier demonstrated, there is a widespread practice among states accepting in principle the need for such recognition and enforcement, albeit subject to limitations of varying degrees. The fact that there is no binding universal treaty governing the practice is not indicative of a widespread rejection of the principle, but only a disagreement as to the imposable specific rules governing the procedure for recognition and enforcement.
>
> This is a significant proposition, as it acknowledges that the procedure and requisites outlined in Section 48, Rule 39 derive their efficacy not

10 GR No 140288 (23 October 2006).

11 *Hilton v Guyot* 159 US 113 at 163–164 (1895) defined comity as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws. It is not the comity of the courts, but comity of the nation".

12 GR No 139325 (12 April 2005).

> merely from the procedural rule, but by virtue of the incorporation clause of the Constitution … [t]he Supreme Court is obliged, as are all State components, to obey the laws of the land, including generally accepted principles of international law which form part thereof, such as those ensuring the qualified recognition and enforcement of foreign judgments. [emphasis added]

B FACTORS CONSIDERED BY COURTS

9 The requested court will consider recognising or enforcing a foreign judgment depending on several factors, as discussed below.

i *Jurisdiction of foreign court*

10 In deciding whether or not to recognise a foreign judgment, the court whose recognition is sought considers whether the rendering court had competent jurisdiction as determined by the rendering court's procedural rules. Where jurisdiction was improperly exercised by the rendering court, the requested court will not recognise such decision.

11 One of the requisites for recognition and enforcement is that the foreign judgment should have been rendered by a judicial or a quasi-judicial[13] tribunal, which had jurisdiction over the parties and the case. A court asserts jurisdiction in proceedings *in personam* through valid service of summons, following the traditional approach to jurisdiction or where standards of fair play and substantial justice parties are met.[14] In *in rem* proceedings, the court acquires jurisdiction over properties within its territory. On the other hand, subject matter jurisdiction is determined by the Philippine Constitution and statutory laws "according to the

13 *Dacudao v DOJ* GR No 188056 (8 January 2013), where it was stated that a "quasi-judicial body is an organ of government other than a court of law or a legislative office that affects the rights of private parties through either adjudication or rulemaking".

14 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 535.

nature of the controversy, thereby determining the competence of the court to try a case and render a judgment".[15]

12 Thus, the Philippine courts can refuse to recognise and enforce a foreign judgment for being rendered by a foreign court which lacked jurisdiction.[16] This statement finds support in section 48 of rule 39 of the Rules of Court.

13 The court in *Northwest Orient Airlines v CA*,[17] discussed that "a foreign judgment is presumed to be valid and binding in the country from which it comes, until the contrary is shown. It is also proper to presume the regularity of the proceedings and the giving of due notice therein". Further:[18]

> Under Section 50, Rule 39 of the Rules of Court, a judgment in an action *in personam* of a tribunal of a foreign country having jurisdiction to pronounce the same is presumptive evidence of a right as between the parties and their successors-in-interest by a subsequent title. The *judgment may, however, be assailed by evidence of want of jurisdiction*, want of notice to the party, collusion, fraud, or clear mistake of law or fact.
>
> …
>
> Consequently, the party attacking a foreign judgment has the burden of overcoming the presumption of its validity.
>
> [emphasis added]

14 In determining whether the foreign court had jurisdiction, the Philippine courts require the foreign procedural law of the acquiring jurisdiction to be proved by evidence (*ie*, it is the internal laws of the foreign court which matters of remedy and procedure have to be determined in accordance with). In case of failure to prove such law, the doctrine of processual presumption is followed. In *Suntay v Suntay*,[19] the

15 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 36.

16 See *Spouses Belen v Hon Chavez* GR No 175334 (26 March 2008) and *St Aviation Services v Grand International Airways* GR No 140288 (23 October 2006).

17 GR No 112573 (9 February 1995).

18 *Northwest Orient Airlines v CA* (GR No 112573) (9 February 1995).

19 GR Nos L-3087 and L-3088 (31 July 1954).

court refused to grant the petition for probate for failure of the plaintiff to prove that the court in China was a probate one.

15 Philippine law requires reciprocity of recognition and enforcement on the part of the foreign court, for the latter court's judgment to be recognised and enforced in the Philippines, under internationally accepted doctrines including the principle of international comity.[20] In *St Aviation Services*, involving a contract between a Singaporean corporation and a Philippine corporation, the court held that although a sovereign state is not bound to give effect to a foreign judgment "under the rules of comity, utility and convenience, nations have established a usage among civilised states by which final judgments of foreign courts of competent jurisdiction are reciprocally respected and rendered efficacious under certain conditions that may vary in different countries".[21]

ii *Fraud*

16 Under section 48 of rule 39, the proof of fraud or collusion may prevent the enforcement of foreign judgment.

17 However, it must be noted that there are two types of fraud, governed by different rules, recognised under Philippine law – intrinsic fraud and extrinsic fraud. To hinder the enforcement of a foreign judgment, the fraud must be extrinsic. To impeach a prior judgment, the material fraud must be based on facts not controverted or resolved in the case[22] where judgment was rendered; or there must have been "collusion by the parties, suppression of an important document or the presentation in evidence of a forged will or falsified affidavit"[23] which goes to the

20 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 549.

21 *St Aviation Services v Grand International Airways* GR No 140288 (23 October 2006).

22 These are facts which do not affect the presence or absence of cause of action. For example, as distinguished from fraud of facts which make up the cause of action, extrinsic fraud may pertain to the act of the party in depriving the other of his day in court.

23 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 556.

jurisdiction of the court or deprived the party against whom judgment was rendered of a chance to defend the action to which he had a meritorious defense. This is distinguished from intrinsic fraud which goes to the very existence of the cause of action, deemed already adjudged.[24]

iii *Public policy*

18 The Philippine courts view public policy "as a defence to the recognition of judgments serves as an umbrella for a variety of concerns in international practice which may lead to a denial of recognition" and one that "can safeguard against possible abuses to the easy resort to offshore litigation if it can be demonstrated that the original claim is noxious to our constitutional values".[25]

19 Article 17 of the Civil Code of the Philippines provides a ground for repelling a foreign judgment when it is contrary to public policy.[26]

20 Since public policy is based on the principle that no person can "lawfully commit any act which has a tendency to be injurious to the public or against the public good",[27] Philippine courts have used the public policy exception as a basis for non-recognition of foreign judgments.

21 In *Pakistan Airlines v Ople*,[28] the employment agreement entered between the foreign corporation doing business in the Philippines and Filipino flight attendants, provided for choice of law and choice of court clauses in favour of Karachi, Pakistan. The Philippine Supreme Court held that:[29]

24 *Asiavest Merchant Bankers Berhad v CA* GR No 110263 (20 July 2001).
25 *Hilton v Guyot* 159 US 113 at 163–164 (1895).
26 Republic Act No 386 (1949).
27 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000), citing *Ferrezzeni v Gsell* 34 Phil 697 (1916); *Lichaco v De Guzman* 18 Phil 283 (1911).
28 GR No 61594 (28 September 1990).
29 *Pakistan Airlines v Ople* GR No 61594 (28 September 1990).

> [P]arties may not contract away applicable provisions of law especially peremptory provisions dealing with matters heavily impressed with public interest. … the relationship is much affected with public interest and that the otherwise applicable Philippine laws and regulations cannot be rendered illusory by the parties agreeing upon some other law to govern their relationship.

22 The award of exemplary damages is provided for in Article 2229 of the Civil Code of the Philippines. Thus, it cannot be considered as contrary to public policy. Nevertheless, it can only be awarded under certain conditions, thus:[30]

> First, they may be imposed by way of example or correction only in addition, among others, to compensatory damages, and cannot be recovered as a matter of right, their determination depending upon the amount of compensatory damages that may be awarded to the claimant. Second, the claimant must first establish his right to moral, temperate, liquidated or compensatory damages. Third, the wrongful act must be accompanied by bad faith, and the award would be allowed only if the guilty party acted in a wanton, fraudulent, reckless, oppressive or malevolent manner.

iv *Due process*

23 When the defendant did not receive timely notice of the proceedings to enable him to defend himself, this is deemed an egregious disregard for due process which will lead the receiving court to deny the foreign judgment recognition and enforcement.[31] As stated in section 48 of rule 39, if the court rendering the judgment lacked jurisdiction; or if the judgment was tainted by fraud, collusion, want of notice or clear mistake of law or fact, then there would be disregard for due process.

24 The case of *El Blanco v Palanca*[32] enumerated the requisites to satisfy due process, namely "(1) There must be a court or tribunal clothed with judicial power to hear and determine the matter before it;

30 *Mendoza v Gomez* GR No 160110 (18 June 2014).

31 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 535.

32 GR No L-11390 (26 March 1918).

(2) jurisdiction must be lawfully acquired over the person of the defendant or over the property which is the subject of the proceeding; (3) the defendant must be given an opportunity to be heard; and (4) judgment must be rendered upon lawful hearing." In determining whether there is compliance with these requisites, foreign law must be proven before the Philippine courts, and failing that, the doctrine of processual presumption applies where Philippine laws on due process determine compliance with due process requirements.

v *Finality of the foreign proceedings*

25 A judgment sought to be recognised must be final and executory and must constitute *res judicata* in another action. It is deemed final or executory "only after expiration of the time allowed by law for appeal therefrom, or, when appeal is perfected, after the judgment is upheld in the appellate court".[33] As an example, in the Philippines, when the 15-day period[34] for appeal expires, the judgment rendered by a Philippine court becomes final. If the foreign judgment can still be appealed to a higher court in the foreign state, the Philippine courts shall refuse its recognition and enforcement. Otherwise, the Court of Appeals or Supreme Court in the state from which the decision originated may reverse the judgment that in the meantime the Philippine court may already have recognised.

26 The foreign judgment cannot be recognised or enforced if it is interlocutory or provisional, contemplating a fuller investigation leading to a later final decision.[35] In *Querubin v Querubin*,[36] the court ruled that because the decree is interlocutory, it is not final and "is subject to change with the circumstances".[37] Such a decree cannot be implemented given that the determination of the question by the court which rendered it did not settle and adjudge finally the rights of the parties.

33 *Perez v Zulueta* GR No L-10374 (30 September 1959).

34 See r 39 of the Judiciary Reorganization Act of 1980 (Batas Pambansa Blg 129).

35 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 535.

36 GR No L-3693 (29 July 1950).

37 *Querubin v Querubin* GR No L-3693 (29 July 1950).

27 A default judgment[38] can be considered final when it is no longer subject to appeal. In *Borthwick v Castro*,[39] the court held that the default judgment issued by courts in Hawaii is enforceable in the Philippines unless it is shown that the declaration of default is incorrect, which Borthwick was unable to do. In *St Aviation Services*,[40] the court ruled that "the judgment of default rendered by the court against respondent is valid considering that the writ of summons was served upon respondent in accordance with our Rules".

vi Res judicata

28 *Res judicata* is a ground for non-recognition. For *res judicata* to apply, its elements must be satisfied, as follows:

(a) the former judgment or order must be final;
(b) the judgment or order must be on the merits;
(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties;
(d) there must be, between the first and the second action, identity of parties, subject matter, and cause of action.[41]

29 When the foreign judgment conflicts with another final and conclusive judgment, the court can refuse to recognise and enforce said foreign judgment. Between a foreign judgment and a Philippine judgment, the author considers that in all likelihood, the Philippine court will uphold its own judgment.

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38 Section 3 of the Rules of Civil Procedure (Bar Matter No 803 (1997)) states that:
> If the defending party fails to answer within the time allowed therefor, the court shall, upon motion of the claiming party with notice to the defending party, and proof of such failure, declare the defending party in default. Thereupon, the court shall proceed to render judgment granting the claimant such relief as his pleading may warrant, unless the court in its discretion requires the claimant to submit evidence. Such reception of evidence may be delegated to the clerk of court …

39 GR No L-57338 (23 July 1987).

40 *St Aviation Services v Grand International Airways* GR No 140288 (23 October 2006).

41 *Taganas v Emuslan* GR No 146980 (2 September 2003).

30 With respect to two conflicting foreign judgments, the Philippine courts will most likely uphold the judgment that is more akin to Philippine law. The author considers that if one foreign judgment relating to successional rights is from a civil law country and one from a common law country, the Philippine courts will more likely uphold the foreign judgment coming from the civil law country. The author arrived at this conclusion on the basis of the Philippines' legal history where its private law was borrowed from the Civil Code of Spain.[42]

vii *Merits review*

31 In recognising a foreign judgment, Philippine courts do not review the merits of the case. This is because foreign laws under which the foreign judgment was rendered are not within the judicial knowledge of the courts. The courts are in no position to substitute their judgment on the legal issue heard and decided by the courts of another state. Thus, Philippine courts are limited to deciding whether or not to recognise the foreign judgment as a fact according to the Rules of Court.

32 In respect of a "clear mistake of law or fact", a Philippine court will not substitute its own interpretation of the law or the evidence for that of the foreign court. If the foreign court errs in fact or law, it can be corrected by a timely appeal.[43] The Philippine courts will only refuse to recognise and enforce a foreign judgment where the clear mistake of fact or law "would work an obvious injustice" on the other party.[44]

33 Section 48(b) of rule 39 of the Rules of Court provides that a foreign judgment or final order against a person creates a "presumptive evidence of a right as between the parties and their successors in interest by a subsequent title". Thus, Philippine courts exercise limited review on foreign judgments. Courts are not allowed to delve into the merits of a foreign judgment. Once a foreign judgment is admitted and proven in a Philippine court, it can only be repelled on grounds external to its merits,

42 Approved by Royal Decree of 24 July 1889.

43 *BPI Securities Corp v Guevara* GR No 159786 (15 August 2006).

44 *Soorajmull Nagarmull v BISCOM* GR No L-22470 (28 May 1970).

ie, "want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact".[45]

34 The reason why Philippine courts refuse to try the case anew is also based on the policy of preclusion, as discussed in *Mijares v Ranada*:[46]

> Otherwise known as the policy of preclusion, it seeks to protect party expectations resulting from previous litigation, to safeguard against the harassment of defendants, to insure that the task of courts not be increased by never-ending litigation of the same disputes…
>
> As crafted, Rule 141 of the Rules of Civil Procedure avoids unreasonableness, as it recognises that *the subject matter of an action for enforcement of a foreign judgment is the foreign judgment itself, and not the right-duty correlatives that resulted in the foreign judgment.*
>
> [emphasis added]

viii *Monetary judgments*

35 Monetary judgments, for whatever purpose (*ie*, payment of debt, damages, including damages awarded pursuant to foreign penal, revenue or other public law, interest), obtained from foreign courts may be recognised or enforced in the Philippines, provided that the judgment must be for a sum certain in money.[47]

36 In *BPI v Guevara*,[48] the Court granted the enforcement of a foreign judgment made by the US District Court of Texas. This foreign judgment ordered the Bank of the Philippine Islands to pay the respondent the sum of US$49,500 with legal interest, attorney's fees, and litigation expenses in favour of the respondent.

45 *BPI v Guevara* GR No 167052 (11 March 2015) citing *Minoru Fujiki v Marinay* GR No 196049 (26 June 2013).

46 GR No 139325 (12 April 2005).

47 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 535.

48 GR No 167052 (11 March 2015).

37 Foreign judgments based on foreign penal, revenue or other public law is entitled to recognition and enforcement, provided that such foreign law is proven, along with the fact of the foreign judgment.

ix *Non-monetary judgments*

38 Non-monetary, *in personam* judgments can also be enforced in the Philippines, following the same rule for recognition and enforcement governing money judgments. In an action *in personam*, the foreign judgment is presumptive, and not conclusive, of a right as between the parties and their successors in interest by a subsequent title. However, the foreign judgment is susceptible to impeachment in our local courts on the grounds of want of jurisdiction or notice to the party, collusion, fraud, or clear mistake of law or fact.[49]

39 In the 2016 Revised Implementing Rules and Regulations of Republic Act No 9160, one of the functions of the Anti-Money Laundering Council is to "receive and take action in respect of any request from foreign states for assistance in their own anti-money laundering operations as provided in the AMLA".[50] Thus, under Philippine jurisdiction, foreign assets may be subject to freeze orders provided that the procedure specified by Anti-Money Laundering Act of 2001[51] and its implementing rules and regulations, are followed.

x *Breach of agreement*

40 Another ground for non-recognition is that the proceeding in the foreign country was contrary to an agreement between the parties under which the dispute must be settled elsewhere.[52] However, the courts have

49 Revised Rules on Evidence (adopted on 14 March 1989) r 39, s 48.

50 2016 Revised Implementing Rules and Regulations of Republic Act No 9160, r 7B(8).

51 Republic Act No 9160 (2001).

52 Jorge Rioflorido Coquia & Elizabeth Aguiling-Pangalangan, *Conflict of Laws: Cases, Materials and Comments* (Central Professional Books, 2000) at p 535.

ruled that despite such agreement, the courts can still take cognizance of the case as held in *Hong Kong and Shanghai Banking Corp v Sherman*.[53]

41 In this case, the respondents guaranteed Eastern Book Supply's loan obligation to the petitioner the Hong Kong and Shanghai Banking Corporation ("HSBC"). When the principal debtor defaulted, HSBC filed suit before the Quezon City courts to enforce the guarantee. The respondents in turn invoked the choice of forum clause in the guarantee agreement in favour of Singapore. The Philippine court ruled that said clause did not oust the Philippine courts of jurisdiction absent the stipulation "that only the courts of Singapore, to the exclusion of all the rest, has [*sic*] jurisdiction".[54]

42 In another case,[55] the court discussed that "contractual choice of law is not determinative of jurisdiction. Stipulating on governing law of a contract does not preclude the exercise of jurisdiction by tribunals elsewhere. The reverse is equally true: the assumption of jurisdiction by tribunals does not *ipso facto* mean that it cannot apply and rule on the basis of the parties' stipulation". Indeed, jurisdiction over subject matter is conferred by law, not by the parties.

43 In summary, Philippine courts will not automatically refuse to recognise and enforce a foreign judgment rendered in breach of an agreed choice of law or choice of court clause. To illustrate, if a contract between Party A and Party B included a choice of forum clause in favour of arbitration, but Party A instead filed a case in a court in State X and won, the Philippine court (State Y) whose recognition of State X judgment is sought, will not look beyond that State X's jurisdiction to hear the case. If it decided that a contractual choice in favour of arbitration was not sufficient to oust their courts of jurisdiction and proceeded with hearing the case, the Philippines court will give it recognition and enforcement.

53 GR No 72494 (11 August 1989).

54 *Hong Kong and Shanghai Banking Corp v Sherman* GR No 72494 (11 August 1989).

55 *Saudi Arabian Airlines v Rebesencio* GR No 198587 (14 January 2015).

44 The Philippines has not acceded to the Hague Convention of 30 June 2005 on the Choice of Court Agreements.

xi In rem *judgments*

45 The Philippines allows for recognition and enforcement of a foreign judgment against property, subject to the exception that the controlling law for real properties is the *lex situs*. To illustrate, in circumstances where a contract is entered into in State A, whereby an unpaid contract of loan between a Canadian creditor and a Filipino debtor results in the foreclosure of a mortgage on real property located in the Philippines, the Philippine courts will not recognise a foreign judgment upholding this agreement due to the constitutional limitations on ownership of real property by foreigners.[56]

46 The effect of an *in rem* judgment is different from that of an *in personam* judgment. In *Mijares v Ranada*,[57] the court said:

> For an action *in rem*, the foreign judgment is deemed *conclusive* upon the title to the thing, while in an action *in personam*, the foreign judgment is *presumptive*, and not conclusive, of a right as between the parties and their successors in interest by a subsequent title. However, in both cases, the foreign judgment is susceptible to impeachment in our local courts on the grounds of want of jurisdiction or notice to the party, collusion, fraud, or clear mistake of law or fact. [emphasis added]

47 It is clear that generally, the grounds for refusing recognition and enforcement in an *in personam* judgment are the same as the grounds for refusing recognition and enforcement in an *in rem* judgment. However, with respect to judgments against real properties, an additional ground is if the judgment goes against the prohibitions on foreign judgments in the

56 Under Art XII of the 1987 Constitution of the Republic of Philippines, there is prohibition with respect to ownership of foreign investors over real properties – they are not allowed to own more than 40% of the real property. With respect to the exploitation, development and utilisation of natural resources, only Filipino corporations – at least 60% of which should be owned by Filipinos – are allowed to engage in such activities.

57 GR No 139325 (12 April 2005).

1987 Constitution[58] reserving certain business, industries and properties to Filipino citizens.

58 See ss 2 and 7 of Art XII of the 1987 Constitution of the Republic of Philippines.

Country Report
SINGAPORE

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A INTRODUCTION

1 An *in personam* judgment lays down the rights and obligations between the parties to the action and binds only those parties. An *in rem* judgment pronounces upon the status of a particular subject matter and purports to bind the whole world. This report focuses on foreign *in personam* and *in rem* judgments in civil and commercial matters.

2 A foreign judgment *in personam* or *in rem* in a civil and commercial matter could be recognised and enforced under Singapore law by the operation of the common law rules or one of three statutory schemes. The statutory schemes are the Reciprocal Enforcement of Commonwealth Judgments Act[1] ("RECJA"), the Reciprocal Enforcement of Foreign Judgments Act[2] ("REFJA") and Part 3 of the Choice of Court Agreements Act 2016[3] ("CCAA").

3 The influence of English law on Singapore private international law must be acknowledged. The Singapore common law rules on the recognition and enforcement of foreign judgments are largely derived from the English common law rules.[4] The RECJA and the REFJA are also modelled on UK statutes.[5] That said, while the English position can be considered as highly persuasive, the Singapore courts refer to decisions

1 Cap 264, 1985 Rev Ed.
2 Cap 265, 2001 Rev Ed.
3 Act 14 of 2016.
4 See also s 3 of the Application of English Law Act (Cap 7A, 1994 Rev Ed).
5 Respectively, the UK Administration of Justice Act 1920 (c 81) and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (c 13).

and developments in a variety of jurisdictions and have departed from English law on occasion.[6]

4 This report will first consider the rules under which foreign judgments *in personam* are recognised and enforced at common law, and under the RECJA and the REFJA. As the rules under these three regimes are largely similar to each other,[7] they will be considered together. Secondly, the rules which apply to foreign judgments *in rem* will be examined. Lastly, the rules underlying the CCAA will be examined.

B COMMON LAW RULES, THE RECIPROCAL ENFORCEMENT OF COMMONWEALTH JUDGMENTS ACT AND THE RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENTS ACT

i In personam *judgments*

5 The RECJA applies to judgments obtained from the superior courts in the UK and superior courts of other Commonwealth countries that may be gazetted from time to time. To date, this list includes, but is not limited to, the courts of Malaysia, Brunei Darussalam, India (except the State of Jammu and Kashmir), the Commonwealth of Australia, and the states of New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia, the Australian Capital Territory, Norfolk Island and the Northern Territory.

6 The REFJA applies to foreign judgments from superior courts of such countries that may be gazetted from time to time. To date, only the Hong Kong Special Administrative Region of the People's Republic of China has been gazetted. Under both statutes, whether the courts of a

6 *Eg*, in relation to the scope of the defence of fraud: see para 19 below.

7 The provisions in the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) were intended (largely) to reflect the common law rules: Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.151.

country are gazetted depends upon the reciprocity of treatment being given to Singapore judgments.[8]

7 A judgment from a gazetted country which is registered under either the RECJA or the REFJA, as the case may be, would be enforceable in Singapore as if it had been an original Singapore judgment. A foreign judgment to which the RECJA applies can still be enforced at common law, but the judgment creditor will generally be unable to recover for costs.[9] A foreign judgment to which the REFJA applies can only be enforced through its regime.[10]

8 In contrast with the statutory schemes, the doctrinal basis underlying the enforcement of a foreign judgment at common law is that the foreign judgment, if it satisfies certain conditions, gives rise to a simple debt which the judgment debtor is obliged to obey under Singapore law.[11] The judgment creditor must sue on a fresh cause of action for a debt. The obligation to pay the debt in Singapore is separate from the original cause of action in the foreign court of origin.[12] There is no requirement at common law that the judgment must emanate from a superior court of the foreign country.

9 At common law, the action on the implied debt has to be commenced within six years of the foreign judgment being handed down.[13] The same six-year period applies for judgments registered under the REFJA.[14] The RECJA stipulates that an application to register a

8 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 5; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 3.

9 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(5).

10 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 7(1).

11 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [42]; *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Ltd* [2014] 2 SLR 545 at [17]; *Alberto Justo Rodriguez Licea v Curacao Drydock Co, Inc* [2015] 4 SLR 172 at [21].

12 *Ralli v Angullia* (1917) 15 SSLR 33.

13 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [49] and [54].

14 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(1)(*a*).

foreign judgment must be commenced within 12 months after the date of the judgment "or such longer period as may be allowed by the Court".[15]

10 In general terms, a foreign judgment will be enforced if: (a) it is on the merits of the case; (b) it is for a fixed or ascertainable sum of money that is not a tax, fine or other penalty; (c) it is final and conclusive; (d) the foreign court had international jurisdiction to hear the case according to Singapore private international law rules; and (e) no defences can be raised against enforcement.

11 A party may wish to request that a foreign judgment be recognised, as opposed to enforced, in order to raise a cause of action or issue estoppel.[16] If the Singapore court is asked to recognise the foreign judgment, the same criteria apply, except for the criterion that the foreign judgment is for a fixed or ascertainable sum of money.[17] The recognition of foreign judgments is primarily subject to the common law rules.[18]

12 A foreign judgment which orders the payment of a sum of money is clearly enforceable. However, the foreign judgment must be a fresh monetary judgment; a judgment which holds that the judgment debtor remains liable for outstanding sums due on a prior judgment is not one where the judgment debtor is being ordered to pay a definite sum of money to the judgment creditor as no fresh obligation is created.[19] The issue of whether the foreign judgment is a fresh monetary judgment is to

15 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(1). See *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166.

16 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322; *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161.

17 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [67].

18 The Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) does not deal with recognition, while the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA") contains one provision which expressly deals with recognition: REFJA, s 11.

19 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129.

be tested by the law of the court of origin.[20] In addition, the monetary award must not amount to the direct or indirect enforcement of a foreign penal, revenue or other public law.[21] Interest on the judgment sum is enforceable.[22]

13 Outside of the CCAA, there is no authority in Singapore law for the enforcement of a foreign judgment ordering non-monetary relief, such as an injunction or specific performance.[23] The foreign judgment which orders non-monetary relief may however be entitled to recognition as being *res judicata* in respect of specific issues or causes of action which it decided. In principle, interim relief such as asset freezing orders would not be enforceable in Singapore. Even if one sets aside the requirement that the foreign judgment be for a fixed or ascertainable sum of money, orders for interim relief are usually granted on an *ex parte* basis, and are not final and conclusive judgments on the merits of the case.

14 A foreign judgment is final and conclusive[24] as long as it is *res judicata* between the parties under the law of that jurisdiction and the judgment cannot be varied, reopened or set aside by the court which

20 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [19].

21 *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [68]; *Alberto Justo Rodriguez Licea v Curacao Drydock Co, Inc* [2015] 4 SLR 172; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 3(2)(*b*).

22 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Ltd* [2014] 2 SLR 545 at [80]; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(8).

23 The Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA") and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA") also confine the recognition and enforcement of *in personam* foreign judgments to monetary judgments: s 2(1) of the RECJA and s 3(2)(*b*) of the REFJA. *Cf Pro Swing Inc v Elta Golf* [2006] 2 SCR 612 (Canada) and *The Brunei Investment Agency v Fidelis Nominees Ltd* [2008] JLR 337 (Jersey).

24 This requirement also applies under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA") (*Ho Hong Bank Ltd v Ho Kai Neo* [1932] MLJ 76, a case on the Judgments (Reciprocity) Enactment (No 10 of 1922) of Johore, which is *in pari materia* with the RECJA on this issue) and under s 3(2)(*a*) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed).

rendered the judgment.[25] In determining the issue of finality, the Singapore court will consider not only Singapore law but also "what the foreign law itself says about the nature of the judgment".[26] The judgment is still final and conclusive even if there is the possibility of appealing the judgment to a superior court.[27] A default judgment which is final unless subsequently altered will also qualify.[28] An interlocutory judgment, which determines finally the rights of the parties in respect of a specific issue, is also capable of being final and conclusive.[29]

15 Whether the foreign court had international jurisdiction to hear the case is tested by Singapore private international law rules.[30] It is irrelevant that the foreign court had jurisdiction to hear the case under its own laws. In general terms, the Singapore court will consider the foreign court to have international jurisdiction to hear the case if the party against whom the judgment was given was either present or resident in the jurisdiction at the time of commencement of proceedings, or, had submitted to the jurisdiction of the foreign court.

25 *Murakami Takako v Wiryadi Louise Maria* [2007] 1 SLR(R) 1119 (HC) at [36], *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR(R) 565 (CA) at [51]; *The Bunga Melati 5* [2012] 4 SLR 546 at [81]; *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [140]–[142].

26 *The Bunga Melati 5* [2012] 4 SLR 546 at [86], citing *The Irina A (No 2)* [1999] 1 Lloyd's Rep 189 at 193.

27 *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [140]. *Cf* s 3(2)(*e*) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and s 6(1) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed).

28 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [77]; *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechnologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [91]–[95].

29 *Equatorial Marine Fuel Management Services Pte Ltd v The Bunga Melati 5* [2010] SGHC 193 (High Court Registry) at [112]–[113], overruled on other grounds *The Bunga Melati 5* [2012] 4 SLR 546 (CA).

30 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Ltd* [2014] 2 SLR 545 at [25].

16 The common law authorities suggest that mere presence, even if temporary, suffices in relation to a defendant who is a natural person.[31] However, residence is required under the RECJA and the REFJA.[32] Where the judgment debtor is a corporation, the test is whether the corporation is carrying on business from a fixed place of business for more than a minimal period of time by an agent or by a representative who is carrying on the corporation's business in the foreign jurisdiction.[33] The REFJA specifically provides that corporate presence is satisfied if the corporation had its principal place of business in the foreign country[34] or had an office or place of business in the foreign country and the proceedings there were in respect of a transaction effected through or at that office or place.[35]

17 Submission may be by conduct or by an agreement to submit. Submission by conduct occurs when the judgment debtor takes a step in the foreign proceedings which necessarily involved waiving its objection to the jurisdiction of the court.[36] Submission by conduct could be

31 *United Malayan Banking Corp Bhd v Khoo Boo Hor* [1995] 3 SLR(R) 839 at [9], citing *Adams v Cape Industries plc* [1990] Ch 433. *Cf RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12.

32 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(2)(*b*) ("ordinary" residence); Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(iv).

33 *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21 at [30], citing *Adams v Cape Industries plc* [1990] Ch 433 at 530. This test is also presumed to apply to interpret the concept of "ordinary" residence of a corporation under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed): Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.173. The Reciprocal Enforcement of Commonwealth Judgments Act also provides for "carrying on business" as another ground of jurisdiction: s 3(2)(*b*).

34 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(iv).

35 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*a*)(v).

36 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088; *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Ltd* [2014] 2 SLR 545; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ss 5(2)(*a*)(i) and 5(2)(*a*)(ii). *Eg*, a defendant who filed a defence, or who made a counterclaim, cross-action or claim for set-off in the proceedings in the original court would be taken to have necessarily waived his

(*continued on the next page*)

imputed to the defendant provided there is no unfairness to the defendant in the imputation.[37] Submission may also be by an agreement to submit.[38] This agreement to submit must be express (usually by means of a choice of court agreement) and cannot be implied.[39]

18 If the above criteria are fulfilled, the foreign judgment will be entitled to recognition and enforcement in Singapore, subject to no defences being raised against the recognition and enforcement thereof. The defences that may be raised include: (a) the foreign judgment was obtained by fraud; (b) the foreign judgment is against Singapore public policy; (c) the judgment was obtained in breach of natural justice; (d) the foreign judgment conflicts with a Singapore judgment; and (e) the foreign judgment conflicts with an earlier foreign judgment that is entitled to recognition under Singapore law. Each of these defences will now be considered in turn.

19 Both the RECJA[40] and the REFJA[41] provide for fraud as a defence against registration of a foreign judgment. At common law, a distinction

objection to the jurisdiction of the court: *Malaysia Marine ABD Heavy Engineering Sdn Bhd v VLK Traders Singapore Pte Ltd* [2014] 1 SLR 998 at [23].

37 *Eg*, where the defendant had submitted to prior proceedings in the foreign court which were discontinued, and the subsequent proceedings, to which the defendant did not take part, are essentially a continuation of the first proceedings: *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545.

38 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(2)(*c*). Under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed), the agreement to submit must be concluded prior to the commencement of proceedings in the foreign court: s 5(2)(*a*)(iii).

39 *United Overseas Bank Ltd v Tjong Tjui Njuk* [1987] SLR(R) 275; *Sun-Line (Management) Ltd v Canpotex Shipping Services Ltd* [1985–1986] SLR(R) 695. Note that the Privy Council, in *Vizcaya Partners Ltd v Picard* [2016] UKPC 5; [2016] 3 All ER 181, has since held that an implied choice of court agreement could confer international jurisdiction on the foreign court; this decision has yet to be considered by the Singapore courts.

40 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(2)(*d*).

41 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1)(*a*)(iv).

has been made between extrinsic and intrinsic fraud.[42] If the fraud relates to extrinsic fraud, that is, fraud that is external to the merits of the case,[43] the allegation of fraud may be raised at the recognition and enforcement stage, even if no new evidence of fraud is put forward and even if the issue of fraud was considered and dismissed in the foreign court.[44] It is also irrelevant that the issue of fraud might have been, but had not, been raised before the foreign court.[45] If the fraud relates to intrinsic fraud, that is, fraud that affects the merits of the case, the allegation of fraud may be raised at the recognition and enforcement stage only if new evidence has been uncovered which reasonable diligence on the part of the defendant would not have uncovered at the time of the original proceedings and the fresh evidence would have been likely to make a difference in the judgment of the foreign court.[46]

20 It is the foreign judgment, and not the underlying cause of action, that has to be against public policy at common law.[47] The position is the

42 It is unclear if the same distinction applies to the fraud defence under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) as this distinction was not drawn at common law at the time the statutes were enacted.

43 Examples of extrinsic fraud include: the defendant had never been served with process, the suit had been undefended without the defendant's default, the defendant had been fraudulently persuaded by the plaintiff to let judgment go by default, or some fraud to the defendant's prejudice had been committed or allowed in the foreign proceedings: *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [21], citing *Woodruff v McLennan* (1887) 14 OAR 242. See also *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechnologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [101]–[103].

44 *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515, which confined the rule in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 to extrinsic fraud. See also *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechnologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [99].

45 *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515 at [18], citing *Syal v Heyward* [1948] 2 KB 443 in the context of the *Abouloff* rule.

46 *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2002] 1 SLR(R) 515; *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechnologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [99].

47 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.211.

same under the REFJA.[48] For example, the enforcement of a foreign judgment that was pursued in breach of an anti-suit injunction granted by the Singapore court would be against Singapore public policy.[49] It is also likely that a foreign judgment based on a gambling debt would be considered to contravene Singapore public policy.[50] However, under the RECJA, the focus is on the cause of action; the foreign judgment will be refused registration if the underlying cause of action that was litigated before the foreign court is against public policy.[51]

21 According to English common law authorities, breach of natural justice traditionally covers situations such as the defendant had not been given notice of the foreign proceedings or had not been given a sufficient opportunity to present his case.[52] The defence now extends to any circumstances involving procedural defects which are contrary to the forum's views of "substantial justice".[53] This defence has not been examined in detail by the Singapore courts. It is likely that the English common law position will also be followed, not least because it also largely echoes the position under the RECJA and the REFJA. That said, the defence operates more narrowly under the statutory schemes. The RECJA provides that the defence may be invoked if the defendant was not duly served with process and did not appear.[54] Under the REFJA, the defendant may plead the defence when he did not receive notice in sufficient time to enable him to defend the proceedings and did not appear, although process was duly served on him in accordance with the law of the foreign court.[55]

48 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1)(*a*)(v).

49 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088.

50 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129.

51 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(2)(*f*).

52 *Jacobson v Frachon* (1928) 138 LT 386.

53 *Adams v Cape Industries plc* [1990] Ch 433 at 564–568.

54 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(2)(*c*).

55 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1)(*a*)(iii).

22 The REFJA, but not the RECJA, contains an estoppel-based defence. At common law, the Singapore courts tend to refer only to fraud, public policy and breach of natural justice as being defences to the recognition and enforcement of foreign judgments. However, there can be no doubt that estoppel-based defences, if it were raised before the court, would be accepted in accordance with orthodox common law principles on *res judicata*.[56] According to the common law, a foreign judgment which conflicts with a local judgment will not be entitled to recognition. This is clearly the case when the local judgment was handed down prior to the foreign judgment.[57] In principle, the same ought to apply even if the local judgment was handed down after the foreign judgment.[58]

23 If the Singapore court is faced with two conflicting foreign judgments which are each entitled to recognition in its own right, it is likely that the Singapore courts would give priority to the earlier judgment.[59] The Singapore courts have a discretion under the REFJA to set aside registration of the later judgment.[60]

24 The RECJA and the REFJA contain additional grounds under which registration may be refused. Under the RECJA, the Singapore court may refuse registration of a foreign judgment, even if it fulfils all the criteria therein, if it would not be "just and convenient" to do so.[61] This provision does not give an untrammelled discretion to the courts; the courts may refuse registration only "where it is practicable and the

56 See further Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at paras 75.218–75.219.

57 *ED & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd's Rep 429. See also s 5(1)(*b*) of the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed).

58 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.218.

59 *Showlag v Mansour* [1995] 1 AC 431.

60 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(1)(*b*).

61 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 3(1).

interests of justice require it".[62] The REFJA sets out a few additional defences based on trite law.[63] The notable additional defence under the REFJA is that the foreign court shall not be deemed to have had jurisdiction if the proceedings in the foreign court had been in breach of an agreement to settle the dispute, unless the defendant had submitted to the jurisdiction of the foreign court.[64] While the RECJA does not have an express provision dealing with a judgment procured in breach of an agreement to settle the dispute, it may be possible that such a judgment could be refused enforcement on the "just and convenient" ground.[65] Whether such a defence is available at common law has not been examined by the Singapore courts.[66]

25 The Singapore court will not re-examine the merits of the foreign judgment. That the foreign court made a mistake of law or fact is not a relevant defence.[67] If part of a foreign judgment is objectionable, while the rest is unobjectionable, the part which is objectionable may be severed and the unobjectionable part enforced, provided the parts can be clearly identified and separated.[68]

62 *Yong Tet Miaw v MBF Finance Bhd* [1992] 2 SLR(R) 549 at [31], adopting *Edwards & Co v Picard* [1909] 2 KB 903 at 907. See also *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 and *Global Distressed Alpha Fund I Ltd Partnership v PT Bakrie Investindo* [2013] 2 SLR 228.

63 *Eg*, s 4(6) (only the balance payable upon partial satisfaction of judgment debt to be registered); s 5(1)(*a*)(vi) (judgment rights not vested in person making the application for registration) and s 5(3)(*c*) (judgment debtor entitled to immunity under the rules of public international law).

64 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(3)(*b*).

65 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.236.

66 *Cf* s 32 of the UK Civil Jurisdiction and Judgments Act 1982 (c 27) which provides for such a defence.

67 *Ralli v Anguilla* (1917) 15 SSLR 33.

68 *Alberto Justo Rodriguez Licea v Curacao Drydock Inc* [2015] 4 SLR 172 at [28]; *Yong Tet Miaw v MBF Finance Bhd* [1992] 2 SLR(R) 549 at [29]; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 4(7).

ii In rem *judgments*

26 In the context of a civil and commercial matter, a foreign judgment *in rem* will usually involve a judgment which declares title or possession over a thing, or a judgment which orders the sale of a thing in satisfaction of a claim against the thing itself.[69] It is the *lex fori* which will characterise the nature of the foreign judgment. In doing so, the Singapore court would consider factors such as the substance of the judgment and its intended effect on the parties;[70] it is irrelevant whether or not the foreign law recognised the concepts of an *in rem* and *in personam* judgment.[71] It is possible for a foreign judgment to contain both *in rem* and *in personam* aspects.

27 At common law, a foreign judgment *in rem* will be recognised in Singapore if the property which was the subject-matter of the proceedings was at the time of the proceedings in the jurisdiction of the foreign court.[72] The same rule applies under the REFJA.[73] The RECJA does not refer to foreign judgments *in rem*.

28 In general, the same defences apply to both foreign *in personam* and *in rem* judgments.[74] However, fraud which would otherwise impeach a foreign judgment would not affect a third party who has acquired title to the property in good faith and for value upon reliance of the judgment *in rem*.[75]

69 L Collins *et al*, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at para 14-109.

70 *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR(R) 565 at [30]; *The Republic of Philippines v Maler Foundation* [2014] 1 SLR 1389 at [64].

71 *Murakami Takako v Wiryadi Louise Maria* [2007] 4 SLR(R) 565 at [30].

72 *The Republic of Philippines v Maler Foundation* [2014] 1 SLR 1389 at [66].

73 Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 5(2)(*b*).

74 Yeo Tiong Min, *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, Reissue, 2013) at para 75.245.

75 *Payna Chettiar v Maimoon bte Ismail* [1997] 1 SLR(R) 738 at [13].

C PART 3 OF THE CHOICE OF COURT AGREEMENTS ACT 2016

29 The CCAA enacts the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA") into Singapore law. It came into force on 1 October 2016. To date, the HCCCA has also entered into force in Mexico and the European Union (excluding Denmark). The US and Ukraine, who are signatories, have yet to ratify the HCCCA. China and Montenegro have also recently signed the HCCCA.

30 Subject to certain exclusions,[76] Part 3 of the CCAA will apply to a foreign judgment emanating from a court of a Contracting State to the HCCCA where the court was the chosen court designated in an exclusive choice of court agreement concluded in a civil or commercial matter, if the choice of court agreement is concluded after the HCCCA enters into force in that Contracting State. It is made clear that the CCAA does not apply to any interim measures of protection.[77]

31 The RECJA and the REFJA do not apply to judgments which may be recognised or enforced under the CCAA.[78] While it is possible for a judgment creditor to pursue enforcement through the common law rather than the CCAA, the process will be simpler under the latter regime. Once the requirements of the CCAA are satisfied, the foreign judgment will be recognised, or recognised and enforced, in the same manner and to the same extent as a Singapore judgment.[79] Further, no time limit applies for the registration of a judgment under the CCAA, although, for recognition purposes, the judgment must remain effective in the state of origin, and for enforcement purposes, the judgment must remain enforceable in the state of origin.[80]

32 The general principle underlying Part 3 of the CCAA is, subject to certain defences, a judgment from the chosen court must be recognised

76 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 9.
77 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 10.
78 Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) s 2A; Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) s 2A.
79 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 13(1).
80 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 13(2).

and enforced.[81] This is provided the foreign judgment is also entitled to recognition and enforcement in the state of the chosen court.[82] The Singapore court is generally barred from reviewing the merits of the foreign judgment and is bound by any findings of fact on which the chosen court assumed jurisdiction, unless the judgment was given by default.[83]

33 The defences provided under the CCAA are similar to those found at common law. The CCAA provides for three grounds under which a foreign judgment must be refused recognition or enforcement. The first ground is based on there being a breach of natural justice. This is framed in terms of inadequacy of notice of the process to enable the defendant to defend the proceedings, unless the law of the state of origin allows the notification to be challenged and the defendant had entered an appearance and presented his case without challenging that notification.[84] The second ground is where the foreign judgment was obtained by fraud in connection with a matter of procedure.[85] The third ground is where the recognition or enforcement of the foreign judgment would be manifestly incompatible with Singapore public policy.[86] This includes circumstances where the foreign proceedings would be incompatible with fundamental principles of procedural fairness in Singapore.[87]

34 Further, the CCAA sets out instances where the Singapore court has a discretion to refuse recognition or enforcement. The foreign judgment may be refused recognition or enforcement if the exclusive choice of court agreement to which the judgment was obtained is null and void under the law of the state of the chosen court.[88] The Singapore court is bound by any finding by the chosen court that the agreement is

81 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 13(4).
82 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 13(2).
83 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 13(3).
84 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 14(*a*).
85 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 14(*b*).
86 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 14(*c*).
87 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 14(*c*).
88 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*a*). "Law" here includes the choice of law rules of the state of the chosen court: Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreement Convention* (2013) at p 69, fn 219 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=98> (accessed 15 August 2017).

valid.[89] This is different from the position under the common law rules, the RECJA and the REFJA, where the issue of whether the foreign court had international jurisdiction is determined in accordance with Singapore private international law rules.

35 Refusal may also be based on the fact that a party to the exclusive choice of court agreement lacked the capacity, under the law of Singapore, to enter into the agreement,[90] or if the defendant was notified of the process in a manner incompatible with the fundamental principles in Singapore concerning the service of documents.[91] Defences based on *res judicata* operate in the same manner as under the common law. If the conflict is with a Singapore judgment, the Singapore judgment may prevail;[92] if the conflict is between two foreign judgments each of which is entitled to recognition under Singapore law, the earlier judgment may prevail.[93]

36 The CCAA specifically provides that the Singapore court may refuse enforcement of exemplary or punitive damages.[94] It also provides that a foreign judgment can be severed and only that part which fulfils the requirements of the CCAA be recognised or enforced.[95]

37 The CCAA allows for the enforcement of non-monetary foreign judgments.[96] To that end, it is a departure from the other regimes.

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89 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*a*).

90 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*b*). "Law" here includes Singapore's choice of law rules: Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreement Convention* (2013) at p 69 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=98> (accessed 15 August 2017).

91 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*c*).

92 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*d*).

93 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 15(1)(*e*).

94 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 16.

95 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 19.

96 Choice of Court Agreements Act 2016 (Act 14 of 2016) s 2(1).

Country Report
SOUTH KOREA

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A INTRODUCTION

1 This report details the rules for recognition and enforcement of foreign judgments in South Korea. The recognition and enforcement of foreign judgments is governed by the relevant provisions in the Civil Procedure Act[1] ("CPA") and the Civil Enforcement Act[2] ("CEA"). Articles 217 and 217*bis* of the CPA and Articles 26 and 27 of the CEA allow the recognition and enforcement of foreign judgments respectively, on the theoretical basis of providing the finality of dispute settlement achieved by foreign judgments and preventing conflicting legal relationships between the same parties.

2 South Korea has not entered into any bilateral or multilateral treaties regarding the recognition and enforcement of foreign judgments.[3] Accordingly, it is the relevant provisions in the CPA and the

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* This report is based upon this reporter's previously published article on the same subject: "Recognition and Enforcement of Foreign Judgments in the Republic of Korea" (2013/2014) 15 *Yearbook of Private International Law* 421. However, that article has been updated in order to reflect court precedents and legislative efforts since the date of publication. This reporter would like to express sincere thanks to Messrs Jong Hyeok Lee and Ji Ung Park for providing assistance in preparing this report.

1 Act No 12882, 30 December 2014.

2 Act No 13286, 18 May 2015.

3 South Korea has concluded bilateral treaties with Australia, China, Mongolia, Uzbekistan and Thailand on judicial assistance in civil and commercial matters, which includes service of judicial documents and taking of evidence: Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and Australia; Treaty between the Republic of Korea and the People's Republic of China on Judicial Assistance in Civil and Commercial Matters; Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of

(*continued on the next page*)

CEA which are applicable in respect of the question of the recognition and enforcement of foreign judgments.[4]

3 In addition, South Korea does not currently appear to have any intention of acceding to the Hague Convention of 30 June 2005 on Choice of Court Agreements ("HCCCA") in the near future.

B REQUIREMENTS FOR THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

4 Pursuant to Articles 26 and 27 of the CEA, a plaintiff must obtain an enforcement judgment (*exequatur*) from a South Korean court to enforce a foreign judgment. In order to obtain such an enforcement judgment, the following conditions for recognition under Article 217 of the CPA must be satisfied:

(a) the judgment must be final, conclusive and no longer subject to ordinary review;
(b) the foreign court must have had international jurisdiction to adjudicate the case in question;
(c) the defendant who lost the case must have been served with the complaint and the summons or any orders in a lawful manner in advance so that he had sufficient time to prepare his defence;
(d) the recognition of the judgment must not be contrary to the public policy of South Korea; and
(e) there must be a guarantee of reciprocity between South Korea and the foreign country to which the foreign court belongs.

5 In principle, while deciding whether to recognise and enforce a foreign judgment, South Korean courts are prohibited from reviewing

Korea and Mongolia; Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and the Republic of Uzbekistan and Treaty on Judicial Assistance in Civil and Commercial Matters between the Republic of Korea and the Kingdom of Thailand.

4 The Supreme Court's decisions have strong precedent value. Its decisions are binding on the specific case being reviewed. For other cases, the lower courts follow those decisions, since their judgments are most likely to be overturned in the appeal process if they stray from the Supreme Court's rulings.

the merits of the foreign judgments. South Korean courts may only review the merits of the case to the extent necessary to determine whether the conditions for the recognition and enforcement of the foreign judgment are satisfied. By way of example, a South Korean court considered the merits of the case in deciding whether a US judgment awarding punitive damages was consistent with the public policy of Korea.[5]

6 South Korean civil procedure law does not distinguish between *in rem* judgments and *in personam* judgments. In principle, if a foreign judgment fully satisfies the conditions under the CPA and the CEA, the judgment will be recognised and enforced, whether it is against a person (*in personam*) or against a property (*in rem*). However, a person rather than a property must be the party in the enforcement proceeding before a South Korean court – *in rem* judgments will not be recognised or enforced in South Korea if this requirement is not satisfied. There is no additional requirement for the recognition and enforcement of *in rem* judgments, such as a requirement that the property should be located in the jurisdiction of the foreign court.

7 Since all the CEA conditions for the recognition of foreign judgments are related to the national interests of South Korea, as well as the personal interests of the concerned parties, South Korean courts should examine the compliance with such conditions *ex officio*.[6]

i *Finality of the foreign judgment*

8 If a foreign judgment is to be recognised and enforced in South Korea, the judgment must be final, conclusive and no longer subject to ordinary review.

5 2007Gahap1076 (Pyeongtaek Branch of the Suwon District Court) (24 April 2009).

6 "*Ex officio*" requires South Korean courts to actively examine the foreign judgments' compliance with all the conditions for recognition and enforcement, without the party's application on such issue.

9 The term "judgment" refers to judicial decisions relating to civil and commercial matters concerning the legal relationships between private parties, rendered by judicial organisations. In order to be enforceable, it should be rendered by a competent foreign judicial organisation with jurisdiction, the proceedings must guarantee cross interrogations between the parties and the contents of the case must be appropriate for coercive performance (for example, contain concrete contractual obligations). The name, form and so forth regarding the decision do not matter.

10 South Korean courts must refuse to recognise and enforce a foreign judgment if an appeal against it is pending before a higher court in the foreign court system or the time to file an appeal has not yet lapsed. Other examples of non-final judgments include orders for provisional measures such as provisional attachments and provisional injunctions.

11 Foreign judgments which are final,[7] irrespective of whether they are money judgments[8] or non-money judgments, including declaratory orders, orders of specific performance or permanent injunctions (excluding orders for preliminary injunctions), can be recognised and enforced in South Korea so long as the conditions for recognition are satisfied. Controversially, South Korean courts cannot allow the recognition and enforcement of foreign asset-freezing orders (known as "Mareva injunctions" in some common law jurisdictions) against assets in the territory of South Korea so long as the orders are provisional measures.[9]

7 Default judgments can be considered final. See Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 350 (written in Korean).

8 For commentary on the enforcement of awards of compensatory damages, see paras 46–51 below. Interest on monetary judgments can be recognised and enforced in South Korea if the interest is stated as payable in the judgment or it is clearly allowed under the law relevant to the judgment: Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 352.

9 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 30.

12 The Supreme Court has held that a confession judgment[10] under the Code of Civil Procedure of the State of California[11] does not constitute a foreign judgment entitled to recognition in South Korea, because the confession judgment cannot be viewed as a judgment of the court and the parties were not guaranteed an opportunity to conduct cross interrogations in the proceedings.[12] However, the Supreme Court has also held that the discharge effect resulting from a court's approval of a rehabilitation plan in a US bankruptcy proceeding could be recognised in South Korea if the conditions for the recognition of foreign judgments are satisfied.[13] This reporter is critical of the latter decision on the basis that (a) the recognition of a foreign bankruptcy proceeding does not occur automatically, but requires a decision of a South Korean court under the relevant provisions of the Debtor Rehabilitation and Bankruptcy Act[14] of South Korea, which has been modelled on the UNCITRAL Model Law on Cross-Border Insolvency of 1997; and (b) in the latter case, the US court's decision to commence the bankruptcy proceeding, which obviously precedes the approval of the rehabilitation plan, had not been recognised in South Korea.

ii *Jurisdiction of the foreign court*

a Application of jurisdiction requirement

13 If a foreign court did not have the jurisdiction to hear the case, the South Korean courts must refuse to recognise and enforce the foreign judgment. The South Korean courts determine the jurisdiction of the foreign court according to the rules of South Korea. This is because Article 217(1) of the CPA explicitly provides that the foreign court must have had international jurisdiction under the principles of international

10 A confession judgment is an "acknowledgment by a debtor of a claim and consent that a judgment may be entered usually without notice or hearing for the amount of the claim when it is due and unpaid": see "Confession of Judgment", *Merriam-Webster.com* at http://merriam-webster.com/legal/confession of judgment (accessed 13 June 2017).

11 11 March 1872.

12 2009Da68910 (29 April 2010).

13 2009Ma1600 (25 March 2010).

14 Act No 14476, 27 December 2016.

jurisdiction laid down by Korean law or treaties. "Korean law" refers to Article 2 of the Private International Law Act[15] ("PILA") and the rules on international jurisdiction in Korean law,[16] whereas "treaties" refer to those to which Korea is a party, such as the Hague Protocol to the Warsaw Convention 1955[17] and the 1999 Montreal Agreement[18] concerning international carriage by air. In other words, South Korean courts will recognise foreign judgments only when the international jurisdiction of the rendering foreign court over the case ("indirect jurisdiction") is found to exist on the basis of the same criteria that the South Korean courts would apply in determining jurisdiction in a similar cross-border action brought before them ("direct jurisdiction").

14 In June 2014, the Ministry of Justice of Korea ("MOJ") established an expert committee ("Committee") to prepare a draft amendment to the PILA (the term of the Committee expired on 31 December 2015).[19] As of 12 June 2017, however, an official draft of the amended PILA has not been published. The MOJ is now in the process of completing the remaining works and is expected to publish the official draft during the

15 Act No 13759, 19 January 2016.

16 The Civil Procedure Act (Act No 12882, 30 December 2014) ("CPA") contains the venue provisions (*ie*, the domestic jurisdiction provisions) on the distribution of judicial power among the various courts within South Korea: Arts 2–25 and 29–31. However, the CPA does not contain any specific provisions on the international jurisdiction of South Korean courts. Instead, principles on international jurisdiction have been developed by past judicial decisions. The Private International Law Act (Act No 13759, 19 January 2016) ("PILA") amended in 2001 introduced three articles on international jurisdiction. Article 2 of the PILA lays down general rules on international jurisdiction and states that detailed and refined rules on international jurisdiction should be developed by consulting the CPA's venue provisions. Thus Art 2 of the PILA requires judges to establish detailed and refined rules on international jurisdiction by considering the special characteristics of international jurisdiction instead of mechanically assuming that rules on international jurisdiction are equivalent to the CPA venue provisions. In addition, Arts 27 and 28 introduced special rules on international jurisdiction to protect consumers and employees, respectively.

17 Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed at Warsaw on 12 October 1929; done at The Hague on 28 September 1955).

18 Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999).

19 This reporter was a member of the Committee.

course of 2017. Accordingly, this reporter believes that the detailed and refined rules on international jurisdiction in the amended PILA will take effect by the end of 2018 or 2019 at the latest. The references in this report to the amended PILA are of the tentative draft which the MOJ prepared in June 2017, which has not been officially released to the public and is subject to further change.

b Specific criteria for determining jurisdiction

15 The specific criteria in the CPA that South Korean courts apply in determining the question of jurisdiction when they are presented with cross-border actions are mentioned in the following paragraphs.

I Defendant's domicile

16 The CPA provides that an action is subject to the jurisdiction of the court located at the place where the defendant has its domicile (in the case of a natural person) or the principal place of business (in the case of a juridical person).[20] It is generally recognised that this rule (*actor sequitur forum rei*) also applies to international jurisdiction.[21]

17 The Committee agreed that a provision expressly setting forth the *actor sequitur forum rei* rule will be included in the amended PILA.

II Place of branch

18 Article 12 of the CPA, a venue provision, provides that an action against a person (both natural and judicial) maintaining an office or a place of business in South Korea can be brought in the court located in that place only if the action concerns the business affairs of such office or such place of business. It is generally recognised internationally that such a rule also applies with regards to international jurisdiction.[22] However,

20 Civil Procedure Act (Act No 12882, 30 December 2014) Arts 2–3 and 5.

21 Kwang Hyun Suk, International Civil Procedure Law (Korea: Pakyoungsa, 2012) at p 91.

22 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 108.

the CPA also provides that the general forum for a foreign juridical person shall be the place in South Korea where it has an office or a place of business.[23] It is not material for the exercise of jurisdiction by the court whether such an office or a place has any relation to a particular action involving the foreign corporation. While the relationship between Articles 5(2) and 12 is not clear, controversially South Korean courts tend to apply Article 5 in determining international jurisdiction.[24] Accordingly, if a foreign corporation establishes a branch office or a place of business in South Korea, it will be subject to South Korean jurisdiction generally without regard to whether the particular cause of action is connected with the operation of the South Korean branch. However, it is not clear whether the Supreme Court still adheres to this view, because it did not follow this approach in a similar dispute in 2010.[25]

19 The Committee agreed that an article along the lines of the following will be included in the amended PILA:

> An action against a person having an office or establishment in Korea and related to the activities of that office may be filed in Korea.

III JURISDICTION BASED ON ACTIVITY OF THE DEFENDANT

20 There is currently no provision on this head in respect of international jurisdiction. However, the Committee agreed to include an article along the lines of the following in the amended PILA:

> An action against a defendant may be filed in Korea where the defendant has continuously and systematically carried on commercial or business activity in, or towards, Korea; provided that the dispute relates to that commercial or business activity.

21 This provision was influenced by the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters

23 Civil Procedure Act (Act No 12882, 30 December 2014) Art 5(2).
24 98Da35037 (Supreme Court) (9 June 2000).
25 2010Da18355 (15 July 2010).

adopted in 1999[26] ("Preliminary Draft") and the Japanese Code of Civil Procedure.[27]

IV PLACE OF PERFORMANCE

22 Article 8 of the CPA provides that an action concerning property rights may be brought before the court located in the place of abode or the place of performance. In a case involving payment of contractual obligations, the Supreme Court held, in 1972, that Article 8 could be a basis for international jurisdiction.[28] Although Article 8 does not seem to be limited to the performance of a contractual obligation, influential views[29] maintain that the provision should not apply to non-contractual obligations. It is not clear whether the Supreme Court still adheres to the position expressed in 1972, because in a recent case, the Supreme Court took a slightly different approach by comprehensively considering various factors related to international jurisdiction, such as fairness and efficiency of the process, rather than simply referring to the venue provision.[30]

23 Under the proposed provision of the amended PILA, the South Korean courts will have international jurisdiction in matters relating to the supply of goods, if the goods were supplied in South Korea or in matters relating to the provision of services, if the services were provided in South Korea. This would mean that the place of performance of a

26 See Art 9. The text and the report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters can be accessed on the Hague Conference website at https://www.hcch.net/en/publications-and-studies/details4/?pid=3494&dtid=35 (accessed June 2017).

27 Code of Civil Procedure (Law No 109 of 26 June 1996) (Japan) Art 3-3(v). Article 3-3(v) states "an action against a person that conducts business in Japan (including a foreign company (meaning a foreign company as prescribed in Article 2, item (ii) of the Companies Act (Act No 86 of 2005)) that continually carries out transactions in Japan". An unofficial English translation of the Japanese Code of Civil Procedure was taken from the Japanese Law Translation Database System which can be accessed at http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=04&re=02&new=1 (accessed August 2017).

28 72Da248 (20 April 1972).

29 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 92.

30 2006Da71908, 71915 (29 May 2006).

contractual obligation could only be a ground of international jurisdiction in very limited circumstances. The decision as to whether the place of performance of a contractual obligation could continue to constitute a head of international jurisdiction has not yet been concluded.

V PLACE OF TORT

24 Under Article 18 of the CPA, an action for tort may be brought before the court of the place where the tortious act occurred. It is generally recognised that Article 18 should also apply in determining the question of international jurisdiction.[31] Where the tortious act occurred in one place and the consequence of the injury occurred in another, each of them could constitute a ground of international jurisdiction over the same tort case.[32] However, this reporter considers that the persuasive view is that such places should be determined rationally from the viewpoint of international jurisdiction and that, particularly in cases of product liability, the defendant's reasonable foreseeability should be taken into account. The Supreme Court in a product liability case has expressly endorsed this view.[33]

25 The Committee agreed that an article along the lines of the Brussels I *bis*,[34] the Preliminary Draft[35] and the Japanese Code of Civil Procedure[36] will be included in the amended PILA. The "mosaic rule", as in the *Shevill* case of the European Court of Justice,[37] is not

31 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 105.

32 82Daka1533 (Supreme Court) (22 March 1983).

33 93Da39607 (21 November 1995). This judgment was apparently influenced by the idea of "reasonable foreseeability" and "purposeful availment" appearing in the decisions of the Supreme Court of the United States (*World-Wide Volkswagen Corp v Woodson* 444 US 286 (1980) and *Asahi Metal Industry Co v. Superior Court* 480 US 102 (1987)).

34 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art 7(2).

35 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Preliminary Document No 11 of August 2000) Art 10.

36 (Law No 109 of 26 June 1996) Art 3-3(8).

37 *Shevill v Presse Alliance* C-68/93; ECLI:EU:C:1995:61.

contemplated. There will be no separate rules on special types of tort, such as product liability or defamation, *etc*.

VI PLACE OF PROPERTY

26 Under Article 11 of the CPA, an action concerning property rights against a person who does not have a domicile in South Korea may be brought before the court of the place in Korea where the subject matter of the claim, the subject matter of security or any attachable property of the defendant is located. This provision appears to confer jurisdiction merely on the grounds of the location of any specified subject matter or property, and the Supreme Court admitted, in 1988, that Article 11 may be applied to international jurisdiction.[38] However, this reporter considers that the persuasive view is that the application of the provision is restricted only to those cases where the defendant has had property in South Korea for a certain period of time (being enough time to establish some real connection to South Korea) and its value is sufficient to cover the plaintiff's claim. Looking at its recent decision in 2014, the Supreme Court appears to be departing from its previous position in that it has comprehensively considered various factors related to international jurisdiction rather than simply looking at the place of property to confer international jurisdiction (*ie*, the Supreme Court now appears to be in agreement with the persuasive view).

27 There was much discussion in the Committee as to whether the presence of the defendant's property could constitute a ground of international jurisdiction for an action relating to property rights in general that is unrelated to that property. The conclusion was that the presence of a property could constitute a ground of international jurisdiction for an action relating to property rights if the property can be the subject of arrest or seizure; provided, however, the foregoing shall not apply where the value of the property is significantly small or Korea has no connection at all, or only a slight connection, with the case.

38 87Daka1728 (25 October 1988).

VII JURISDICTION AGREEMENT

28 In practice, the parties' agreement on international jurisdiction plays a very important role. Although the CPA does not contain any express provision regarding the effectiveness of the parties' agreement on international jurisdiction, South Korean courts generally recognise the effectiveness of such an agreement and give effect to it.[39] Accordingly, if a foreign judgment is rendered in breach of an agreement for the settlement of the dispute, the courts of South Korea would refuse to recognise and enforce the foreign judgment on the basis it lacks jurisdiction. However, the Supreme Court held in 1997 that, in order for a jurisdiction clause conferring exclusive jurisdiction upon a foreign court to be valid, the following conditions must be met:

(a) the case does not fall under the exclusive jurisdiction of South Korea;[40]
(b) the designated foreign court has valid international jurisdiction under its law;
(c) the case should have a reasonable relationship with the designated foreign court; and
(d) the jurisdiction agreement is not grievously unreasonable or unfair.[41] The Supreme Court maintains its position despite legal commentators'[42] criticisms of condition (c).[43]

29 With regard to requirement (c) mentioned above, the Committee has agreed not to follow the Supreme Court's position. In addition, taking into consideration the entry into force of the HCCCA, the Committee decided to set out its position in the amended PILA as follows:

> A Korean court shall dismiss proceedings where there is an exclusive choice of court agreement in favour of a foreign court, unless (i) the

39 *Eg*, 91Da14994 (Supreme Court) (21 January 1992) and 96Da20093 (9 September 1997).
40 See paras 33–34 below.
41 96Da20093 (9 September 1997).
42 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at pp 120–121.
43 *Eg*, 2010Da28185 (26 August 2010).

agreement is null and void under the law (including choice of law rules) of the State of the chosen court; (ii) a party lacked the capacity to conclude the agreement; (iii) giving effect to the agreement would be manifestly contrary to the public policy of South Korea; or (iv) the chosen court has decided not to hear the case or there is a situation in which the agreement cannot properly be performed.

VIII Appearance

30 Even if a person is not otherwise subject to the international jurisdiction of the South Korean courts, if he appears before a South Korean court and responds to the merits without reserving his objection against the jurisdiction of the South Korean court, the court will assume international jurisdiction over him since he can be deemed to have consented to the international jurisdiction of the South Korean courts.[44]

IX Protection of socio-economically weaker parties

31 The PILA sets forth special rules on international jurisdiction in respect of passive consumer contracts and individual employment contracts,[45] which are modelled on the Brussels Convention,[46] and the Preliminary Draft.[47] In short, whereas a consumer's habitual residence is relevant in consumer contracts, the place where the employee habitually performs his work is relevant in individual employment contracts.

X Related jurisdiction

32 The CPA contains a provision allowing an action against several persons or an action involving several claims to be brought before the court having jurisdiction over one of the defendants or one of the

44 Civil Procedure Act (Act No 12882, 30 December 2014) Art 30.

45 Private International Law Act (Act No 13759, 19 January 2016) Arts 27–28.

46 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, Arts 13–15.

47 Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Preliminary Document No 11 of August 2000) Arts 7 and 8.

claims.[48] Some legal commentators[49] take the view that the provision could be applicable to cross-border actions as well as domestic actions.

XI EXCLUSIVE INTERNATIONAL JURISDICTION

33 The CPA does not contain provisions on the exclusive international jurisdiction of the South Korean courts. However, it is considered by legal commentators that the South Korean courts have exclusive international jurisdiction in the following cases:

(a) in proceedings concerning rights *in rem* in immovable property if the property is situated in South Korea;
(b) in proceedings concerning the validity of the constitution, nullity or dissolution of companies or the validity of the decisions of their organs, if the company has been established under South Korean law;
(c) in proceedings concerning the validity of entries in public registers, if the register is kept in South Korea; and
(d) in proceedings concerning the registration or validity of patents, trademarks, or other similar rights required to be registered, if the registration has been applied for or has taken place in South Korea.[50] This is very similar to the list of exclusive

48 Civil Procedure Act (Act No 12882, 30 December 2014) Art 25.

49 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 134.

50 With regard to (d), there was a dispute as to whether proceedings in which a South Korean plaintiff required a Japanese defendant to transfer and register the transfer of patents registered in Japan pursuant to a contract between the parties were subject to the exclusive jurisdiction of Japan or not 2009Da19093 (Supreme Court) (28 April 2011). While the Supreme Court admitted that proceedings where the subject matter is the validity or existence of patents generally fall under the exclusive jurisdiction of the country of registration, it held that the proceedings in question did not fall under the exclusive jurisdiction of Japan, because the principal subject matter of the dispute was the interpretation of the contract and the rights and obligations of the parties under the contract. The judgment was welcomed by legal commentators in South Korea: see Ju Sang Kim, "Recognition and Enforcement of Foreign Judgments" (1975) 6 SABEOPNONJIP 485 and In Jae Lee, "Agreement on International Jurisdiction" (1989) 20 SABEOPNONJIP 646.

jurisdictions under the Brussels I Regulation.[51] Therefore, if a foreign judgment relates to a matter which falls within the exclusive jurisdiction of the South Korean courts, it would not be recognised and enforced by the South Korean courts due to a lack of international jurisdiction.

34 Although the Committee has not resolved the question as to whether the articles dealing with exclusive jurisdiction shall be in the respective related chapters or in Chapter 1, the rules on exclusive jurisdiction will be included in the amended PILA.

XII *FORUM NON CONVENIENS*

35 There is a split in opinion amongst legal commentators in Korea as to whether or not the doctrine of *forum non conveniens*, under which South Korean courts may refuse to exercise international jurisdiction even if they have international jurisdiction according to the standard established by the PILA, is permitted. In the past, South Korean judges had some flexibility as they could resort to the so-called "special circumstances theory" modelled on Japanese court precedents, in which the courts would deny the existence of international jurisdiction in light of special circumstances, even if international jurisdiction would seem to exist when looking at the venue provisions of the CPA.[52]

36 The Committee has decided to include an express article permitting the *forum non conveniens* doctrine in the amended PILA. The purpose is to give South Korean judges some discretion in individual cases in exercising international jurisdiction after considering the totality of the circumstances of the case in question. That said, if a foreign judgment was rendered by a foreign court which has indirect jurisdiction according to South Korea's private international law rules, but in circumstances where South Korean courts would have refused to hear the case due to *forum non conveniens*, this reporter considers it likely that South Korean

51 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Art 22.

52 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 74.

courts would recognise such foreign judgment, since the foreign court had international jurisdiction.

iii *Lawful and timely service of process*

37 Article 217(1)(b) of the CPA provides that:

> [T]he defendant who has lost the case must have been served with the complaint (or equivalent document) and the summons or any orders in a lawful manner (other than public notice or similar methods) in advance so as to allow sufficient time for preparation of his defence, or the defendant must have responded to the suit without having been served.

38 Whether the service of process is lawful should be decided on the basis of the concerned foreign law since service of process is a procedural matter in principle; provided, however, that the service of process should not infringe on the sovereignty of South Korea.[53]

iv *Existence of Reciprocity*

39 According to Article 217(1)(d) of the CPA, one of the conditions for the recognition of foreign judgments is the existence of reciprocity between South Korea and the relevant foreign country. South Korean courts must refuse to recognise and enforce a foreign judgment if the courts of the foreign jurisdiction do not or would not recognise and enforce similar decisions made by the courts of South Korea. Reciprocity need not necessarily be guaranteed by a treaty or convention, it is sufficient if reciprocity is assured by law or regulation, customary law, court decisions or prevailing practices. The expectation of receiving reciprocal treatment is sufficient, even if there have been no actual cases extending reciprocity to South Korean judgments. Conversely, the mere

53 If the service of process is effected through means that are not prescribed by the South Korean statutes or international treaties to which South Korea is a party, it would be considered an infringement on the sovereignty of South Korea, so long as the service is effected in Korea.

existence of a foreign law or regulation providing for reciprocal treatment is not sufficient if such reciprocity is not implemented in practice.[54]

40 The reciprocity condition would be satisfied if the applicable foreign courts would recognise South Korean judgments under conditions similar to those set out in the CPA.[55] In 1971, the Supreme Court held in a case involving the recognition and enforcement of a divorce decree from a court of the State of Nevada in the US that there is reciprocity only if the concerned foreign courts recognise South Korean judgments under the same or more generous conditions than those applicable in South Korea.[56] However, the Supreme Court changed its position in 2004 and now maintains the more liberal approach described above.[57] Article 217(1)(d) amended in 2014 expressly adopted the more liberal approach.

41 The existence of reciprocity should be determined by comparing the conditions for recognition of the same kind of foreign judgment in the foreign country and South Korea. Accordingly, the fact that a foreign court has recognised a non-monetary judgment (such as a divorce judgment) of a South Korean court will not be sufficient to demonstrate that there exists reciprocity between South Korea and the foreign country for a monetary judgment. The Supreme Court Judgment of 2004 mentioned above made this point clear by stating that in comparing the conditions for recognition of foreign judgments of the two countries, the focus should be on the same kind of judgments.

42 In respect of the countries to which this report applies (the ASEAN countries and Australia, China, India and Japan), the South Korean courts have held that there is reciprocity between South Korea

54 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at pp 397–398.

55 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 399.

56 71Da1391 (22 October 1971).

57 2002Da74213 (28 October 2004).

and Japan, China and Hong Kong, at least in so far as money judgments are concerned.[58]

43 On the other hand, the Supreme Court denied the existence of reciprocity to an Australian judgment ordering the payment of damages rendered by a court in New South Wales.[59] However, since Australia added, in 1999, the courts of South Korea to the list of courts in respect of which Australia is willing to afford reciprocity,[60] South Korean courts are reasonably expected by this reporter to acknowledge in the future the existence of reciprocity between South Korea and Australia.

44 Given a lower court decision which acknowledged the existence of reciprocity between South Korea and England,[61] South Korean courts could be expected to acknowledge the existence of reciprocity between South Korea and other Commonwealth countries (other than Australia) which follow the English approach.[62] However, the issue as to whether reciprocity exists between South Korea and England (and therefore also other Commonwealth countries) needs a more thorough analysis.

v *Public policy*

a General meaning of the test

45 Article 217(1)(c) of the CPA provides that "the recognition of the foreign judgment must not be contrary to the good morals or other social order of South Korea considering its substantive aspects as well as the procedural aspects".

58 For information, the South Korean courts have also held that there is reciprocity between South Korea and Germany, England, Argentina, Ontario (Canadian Province) and various States of the US which have adopted the Uniform Foreign-Country Money Judgments Recognition Act 1962, again in so far as money judgments are concerned.

59 85Daka1767 (28 April 1987).

60 Foreign Judgments Regulations 1992 (Aust) Schedule.

61 2009Gahap477 (Tongyeong Branch of the Changwon District Court) (24 June 2010).

62 For the purposes of this report, these would be Brunei, India, Malaysia and Singapore.

b Substantive aspects of public policy

46 In connection with the recognition and enforcement of a foreign arbitral award, the Supreme Court held in 1990 that in determining whether or not to recognise a foreign arbitral award, the South Korean courts should take into account the need for the stability of international transactions, as well as the domestic situation.[63] This statement is also relevant in the context of the recognition of foreign judgments.[64] Accordingly, it is generally accepted that South Korean courts would interpret the public policy test to refer to "international public policy", rather than "domestic public policy".

47 In determining the question of public policy, South Korean courts may examine the reasons for the foreign decision, although the South Korean courts should adhere to the principle that they should not re-examine the merits of a case.[65] In other words, the *révision au fond* is prohibited, although the South Korean courts may review the merits of the foreign judgments in so far as such review is necessary to determine whether the conditions for recognition are satisfied or not.[66]

48 Foreign judgments ordering punitive or non-compensatory damages are not uniformly refused recognition and enforcement in South Korea. The question of public policy is applicable in respect of a foreign judgment awarding punitive damages, treble damages or grossly excessive damages.

49 South Korean law does not permit punitive damages or multiple damages if they are not related to the actual damage suffered by the victim. Moreover, the compensatory damages permissible under South Korean law are calculated in proportion to the degree of the actual damage suffered by the victim. In addition, in cases where a tort is governed by foreign law under the PILA, damages arising from the tort

63 89Daka20252 (10 April 1990).

64 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 374.

65 Civil Enforcement Act (Act No 13286, 18 May 2015) Art 27(1).

66 94Daka1003 (Supreme Court) (9 February 1988). This case is concerned with the recognition of a foreign arbitral award.

shall not be awarded by a South Korean court if damages is clearly not appropriate to compensate the injured party or if the extent of the damages substantially exceeds appropriate compensation to the injured party.[67] Accordingly, the courts have indicated that the recognition of foreign judgments awarding punitive damages could violate the public policy of Korea.[68] The same principle would apply to foreign judgments awarding treble damages in so far as the amount exceeds the actual damage suffered by the victim. However, the concept of treble damages was introduced in 2011 into the Act on Fairness of Subcontracting Transactions[69] and subsequently into other statues. The impact this change has on South Korean courts with regard to the recognition and enforcement of foreign judgments ordering payment of treble damages has not yet been settled.

50 As regards grossly excessive damages, the recognition of a foreign judgment awarding damages for an amount grossly greater than one that would be awarded by a South Korean court in a similar case may be considered to be contrary to the public policy of South Korea. In a case, in 1995, involving the recognition and enforcement of judgment of the court of the State of Minnesota against a South Korean defendant ordering payment of US$500,000 as damages (including compensation for mental anguish, physical injury, consequent medical expenses, loss of earning, *etc*), plus reasonable compensation for damages arising out of the assault and rape of the plaintiff, the Eastern Branch of the Seoul District Court found that the amount of the award was much higher than what would be acceptable under South Korean law for such damages. Thus, the court reduced the amount of compensation that could be enforced in Korea to 50% of the original amount, on the ground that recognition and enforcement of the portion in excess of US$250,000 would be against the public policy of Korea.[70] The judgment was upheld by the Supreme Court in 1997. Since then various lower courts have followed this approach, and it is generally considered that the South Korean courts can

67 Private International Law Act (Act No 13759, 19 January 2016) Art 32(4).

68 2007Gahap1076 (Pyeongtaek Branch of the Suwon District Court) (24 April 2009).

69 Fair Transactions in Subcontracting Act (Act No 14143, 29 March 2016).

70 93Gahap19069 (10 February 1995).

recognise only part of a foreign judgment ordering payment of grossly excessive damages based upon the public policy exception.[71]

51 However, the impact of the introduction of Article 217*bis*(1) of the CPA on the recognition and enforcement of a foreign judgment ordering payment of grossly excessive damages should also be considered. Article 217*bis*(1) inserted in 2014 expressly provides that a South Korean court may not recognise a foreign judgment in part or in whole, if the foreign judgment concerning damages leads to a result that is manifestly incompatible with the basic principles of the laws of South Korea or the treaties to which South Korea is a party. Article 217*bis*(2) also provides that in cases where a South Korean court applies Article 217*bis*(1), regard is to be had to whether the scope of damages rendered by the foreign court encompasses legal costs such as lawyers' fees.[72] This reporter used to believe that the purpose of Article 217*bis* was to set forth clearer criteria than those under the public policy test, rather than introducing new, stricter requirements for the recognition of foreign judgments. However, the Supreme Court has recently held that Article 217*bis* is applicable to foreign judgments ordering payment of punitive damages, while it is not applicable to those ordering the compensation for the actual damages, regardless of the extent of the damages.[73] There is accordingly controversy as to whether the recent decisions of the Supreme Court are consistent with the genuine purpose of Article 217*bis*.

c Procedural aspects of public policy

52 Recognition of a foreign judgment will be refused if the judgment is contrary to the procedural public policy of South Korea, which corresponds to the concept of due process. In other words, if the fundamental procedural principles of South Korean law, which should be

71 99Gahap14496 (Southern Branch of the Seoul District Court) (20 October 2000); 2009Na3067 (Busan High Court) (23 July 2009).

72 Article 217*bis*(2) simply requires that due consideration be given to determine whether the damages ordered encompass legal costs such as lawyers' fees. This implies that, even if a foreign judgment includes an order for payment of grossly excessive damages, the part of the order that is in respect of lawyers' fees could be enforced to that extent.

73 2015Da1284 (15 October 2015); 2015 Da207747 (28 January 2016).

carried out in the foreign courts as well, have been violated in the judicial procedure conducted in the foreign country, then the foreign judgment cannot be recognised in South Korea. Article 217(1)(c) of the CPA amended in 2014 expressly requires the courts to consider the judicial procedure which the foreign judgment has passed through.

53 Recognition of a foreign judgment would be contrary to the public policy of South Korea if the concerned foreign court did not provide the defendant with opportunities to defend himself, or if the defendant was not properly represented by an attorney during the trial. However, the mere lack of reasoning in the foreign judgment would not be against the procedural public policy of South Korea.

54 The Supreme Court has held that the recognition and enforcement of a foreign judgment is not allowed on the ground that it is contrary to the procedural public policy of South Korea if the foreign judgment was acquired by a procedural fraud such as false evidence, false statements and intentional suppression of important evidence. The Supreme Court set some conditions to the scope of this by declaring that the recognition and enforcement of a foreign judgment may be refused only when the defendant could not allege the existence of fraud in the foreign court and the existence of a punishable fraud has been proven with high certainty in a South Korean court.[74]

55 If a foreign judgment conflicts with a judgment involving the same parties and the same subject matter rendered by the court of South Korea, the South Korean courts should refuse to recognise and enforce the foreign judgment. There is no explicit provision in this regard. However, the Supreme Court declared, in a case not concerning property rights, that a foreign judgment incompatible with the judgment of the South Korean courts could not be recognised as it would be contrary to the procedural public policy of South Korea.[75] If a South Korean court is faced with two conflicting foreign judgments, each of which is entitled to

74 2002Da74213 (28 October 2004).
75 93Meu1051/1068 (10 May 1994).

recognition and enforcement in its own right, the prior foreign judgment should prevail and be recognised.[76]

76 Kwang Hyun Suk, *International Civil Procedure Law* (Korea: Pakyoungsa, 2012) at p 394.

Country Report
KINGDOM OF THAILAND

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A INTRODUCTION

1 Unlike jurisdictions like Singapore or Australia, Thailand adopts a civil law legal system. This means that the main sources of law in Thailand are found in statutes while cases decided by the courts are only manifestations of how statutes are to be read and applied. Thailand has no specific statute addressing the recognition and enforcement of foreign judgments. This is so even though Thailand has a statute on private international law which dates back to 1938 (BE 2481),[1] namely the Act on Conflict of Laws.[2]

2 There is only a rather vague and unhelpful provision in the Act on Conflict of Laws which purports to bridge the gap when there is no specific provision of the Act on Conflict of Laws that addresses a specific private international law issue. This is provided for in section 3 of the Act on Conflict of Laws, which is in the following terms:

> Wherever there is no provision in this Act or in any other laws of Thailand to govern a case of conflict of laws, the general principles of private international law shall apply.

1 Thailand uses the Buddhist Era calendar which is 543 years ahead of the Gregorian year. For example, the year CE 2017 is indicated as 2560 BE in Thailand.

2 Office of the Council of State, Act on Conflict of Laws (BE 2481) [1938] (สำนักงานคณะกรรมการกฤษฎีกา, พระราชบัญญัติว่าด้วยการขัดกันแห่งกฎหมาย พ.ศ. ๒๔๘๑) <http://web.krisdika.go.th/data/outsitedata/outsite21/file/Act_on_Conflict_of_Law,_B.E._2481.pdf> (accessed, 28 November 2016).

3 Therefore, the first issue to be discussed in this report is the impact of section 3 on the recognition and enforcement of foreign judgments in Thailand. Thereafter, the overall attitude of the courts in Thailand towards the recognition and enforcement of foreign judgments will be addressed.

B IMPACT OF SECTION 3 OF THE ACT ON CONFLICT OF LAWS

4 There is, so far, no decided case in Thailand on the application of section 3 of the Act on Conflict of Laws to foreign judgments. Academic commentators in Thailand construe this provision differently. Written in 1984 (BE 2527), Indrambarya opined that it would be inconsistent with the purposive approach to statutory interpretation to give section 3 a wide meaning such that it can encompass the recognition and enforcement of foreign judgments.[3]

5 This is because the whole purpose of the Act on Conflict of Laws is to stipulate "connecting factors" for different scenarios of cases involving foreign elements.[4] In other words, the Act on Conflict of Laws primarily deals with methods of ascertaining applicable law.[5] Conversely, Lengthaisong thought that the "general principles of private international law", as stipulated in section 3, can be ascertained with reference to the earlier judgment of the Supreme Court of Thailand in Case No 585/2461 decided in 1918.[6]

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3 Kanok Indrambraya, "Opinion and Observation on the Judicial Co-operation for the Recognition and Enforcement of Foreign Judgments" (BE 2527) 31(2) *Dulapaha Journal* 56 at 63–64 (translated) (กนก อินทรัมพรรย์, "ความเห็นและข้อสังเกตุในเรื่องความร่วมมือทางศาลเกี่ยวกับการยอมรับบังคับตามคำพิพากษาต่างประเทศ", *ดุลพาห* (2527) 31(2) 56).

4 Kanok Indambraya, "Opinion and Observation on the Judicial Co-operation for the Recognition and Enforcement of Foreign Judgments" (BE 2527) 31(2) *Dulapaha Journal* 56 at 63–64 (translated).

5 Kanok Indambraya, "Opinion and Observation on the Judicial Co-operation for the Recognition and Enforcement of Foreign Judgments" (BE 2527) 31(2) *Dulapaha Journal* 56 at 63–64 (translated).

6 Sathitya Lengthaisong, "Enforcement of Foreign Judgments According to Thai Law" (BE 2515) 4(1) *Thammasat Law Journal* 76 at 80 (translated) (สถิตย์ เล็งไธสง,

(*continued on the next page*)

6 In his thesis, Sriboonroj – relying on the report of the sub-committee meeting to set criteria for determining cases on conflict of laws held in 1938 (BE 2481) which led to the enactment of the Act on Conflict of Laws – was inclined to agree with the restrictive interpretation of section 3 on the basis that the drafter of the Act on Conflict of Laws did not have the recognition and enforcement of foreign judgments in mind and the intention was to let Thai courts themselves set out rules or criteria on the recognition and enforcement of foreign judgments.[7]

7 This author is also inclined to agree with Sriboonroj's view as it is doubtful what so-called "general principles", which refer to principles universally accepted, can be recognised in Thailand after just one decided case. However, more facets of the judgment of the Supreme Court of Thailand in Case No 585/2461 need to be discussed. It should be emphasised at this stage, however, that there is still no decision from the court in Thailand which sheds light on how section 3 of the Act on Conflict of Laws should be interpreted.

C OVERALL ATTITUDE OF THAI COURTS TOWARDS RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

8 The Supreme Court of Thailand's decision in Case No 585/2461 is the only decision in Thailand which is directly on point. As the case is very old, this author was not able to obtain a copy of the original Thai language judgment of the case. However, it is a case which is widely

"การบังคับตามคำพิพากษาศาลต่างประเทศตามกฎหมายไทย", *วารสารนิติศาสตร์* (2515) 4(1) 76). For the discussion on the case, see para 8 *ff*.

7 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at p 57 (translated) (อานนท์ ศรีบุญโรจน์, "การรับรองและการบังคับตามคำพิพากษาศาลต่างประเทศในกลุ่มประเทศอาเซียน" (วิทยานิพนธ์นิติศาสตร์มหาบัณฑิต สาขากฎหมายระหว่างประเทศ คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์, พ.ศ. 2554)).

referred to among Thai academic commentators. Ariyanuntaka sets out the facts, and quotes the *ratio decidendi* of the case, as follows:[8]

> The plaintiff … a Vietnamese citizen entered into a contract of sale with the defendant … also of [*sic*] Vietnamese subject whereby the defendant sold 15 rickshaws and two bicycles to the plaintiff. The plaintiff claimed that he had paid the defendant for the price but the defendant failed to deliver the goods. The contract was concluded in Saigon. The plaintiff then sued the defendant in Saigon Civil Court. The Court gave judgment for the plaintiff. The defendant fled to Bangkok where the plaintiff sought enforcement of Saigon Civil Court judgment. The Supreme Court of Siam [former name of Thailand] … held that:
>
> > '*The principle underlying recognition and enforcement of foreign judgments is one of mutual respect among nations. The court of Siam will recognise and enforce judgment rendered by a foreign court provided that the judgment was given by the court of competent jurisdiction. The judgment must also be final and conclusive of the merits of the case. In this case, the plaintiff and the defendant were both Vietnamese citizens and thus, the Saigon Civil Court enjoyed competent jurisdiction over the case. However, the judgment of the Saigon Civil Court was given in default. The plaintiff failed to prove the Vietnamese civil procedural law concerning the finality and conclusiveness of the judgment given in default. Under the Civil Procedural Act BE 2452 (1909) of Thailand, the defendant who had been declared by the court to be in default of appearance and against whom a judgment had been given, may apply for a new trial within fifteen days from the date of judgment. Upon failure to prove otherwise, the Court of Siam will hold that judgment given in default is not final and conclusive.*'
>
> [emphasis in original]

9 This judgment, as noted by Ariyanuntaka, has received severe criticism from Thai academic commentators on the basis that the judge who presided in this case graduated from Gray's Inn and was called to the Bar in the UK. Hence, his judgment was influenced by English law.[9]

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8 Vichai Ariyanuntaka, "Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective" <http://www.coj.go.th/en/pdf/AlternativeDisputeResolution04.pdf> (accessed 8 February 2017).

9 Vichai Ariyanuntaka, "Jurisdiction and Recognition and Enforcement of Foreign Judgments and Arbitral Awards: A Thai Perspective" <http://www.coj.go.th/en/pdf/AlternativeDisputeResolution04.pdf> (accessed 8 February 2017).

While it is probable that the judge may have had in mind classic English authorities on the recognition and enforcement of foreign judgments, the question is whether these English authorities have gained acceptance worldwide such that they could be regarded as spelling out the universally accepted general principles of private international law.

10 By way of analogy, albeit on a different matter, in Book III of the Thailand Civil and Commercial Code,[10] which has been in force since 1928 (BE 2471), section 868 provides that "[c]ontracts of marine insurance are to be governed by the provisions of the Maritime Law". However, Thailand has no law relating to marine insurance. As such, Thai lawyers have to resort to section 4 of Book I of the Thailand Civil and Commercial Code (amended in the year 1992 (BE 2535))[11] which provides:

> The law must be applied in all cases which comes within the letter and spirit of any of its provisions.
>
> Where no provision is applicable, the case shall be decided by analogy to the provision most nearly applicable, and in default of such provision, by the general principles of law.

11 The Supreme Court of Thailand in Decision No 7350/2537 held that since the marine insurance policy in question was written in the English language, the UK Marine Insurance Act 1906[12] should be applied by analogy. This is quite an odd rationale and the better view, as opined by Kanchanachittra-Saisoonthorn in her note attached to this decision, is to treat the UK Marine Insurance Act 1906 as "the general principles of law" concerning marine insurance contracts.[13]

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10 *Ie*, ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๓ พ.ศ. ๒๔๗๑.

11 *Ie*, ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๑ แก้ไขเพิ่มเติมโดยพระราชบัญญัติให้ใช้บทบัญญัติบรรพ ๑ แห่งประมวลกฎหมายแพ่งและพาณิชย์ที่ได้ตรวจชำระใหม่ พ.ศ. ๒๕๓๕ (Civil and Commercial Code Book I amended by the Act promulgating the Revised Provisions of Book I of the Civil and Commercial Code (BE 2535)) (translated).

12 c 41.

13 See Phunthip Kanchanachittra-Saisoonthorn, "Note to the Supreme Court decision no 7350/2537" <http://deka.supremecourt.or.th/search> (accessed 20 February 2017) (translated) (พันธ์ทิพย์ กาญจนะจิตรา สายสุนทร, "หมายเหตุท้ายคำพิพากษาฎีกาที่ ๗๓๕๐/๒๕๓๗").

12 Transposing this reasoning to the context of the recognition and enforcement of foreign judgments, even if the wider interpretation of section 3 of the Act on Conflict of Laws is adopted, the English common law rules on the recognition and enforcement of foreign judgment are unlikely to be regarded as the "general principles of private international law" for at least two inter-related reasons.

13 First, unlike public international law, the rules on private international law differ from country to country. Second, the execution of foreign judgment is pretty much left to the forum as procedural matters. Unless court practices around the world on this matter are harmonised, it is hard to glean any general principle of private international law in this respect.

14 More recently, the recognition of a foreign judgment was considered again in Decision No 2551/2548 of the Central Juvenile and Family Court of Thailand.[14] The facts of the case are well summarised in the work of Sriboonroj.[15] The plaintiff, a Swedish man, sued the defendant, a Thai woman. The two of them had lived together as husband and wife, without any legally recognised marriage, and had a child. Under Thai law, a child born out of wedlock is deemed to be the legitimate child of the birth mother. The biological father of the child is not recognised as the legal father of the child and has no rights over the child. The father's rights over the child can, however, be legitimised if, among other things, there is a judgment by the court.[16]

14 This author was unable to locate a link to the original judgment on the website of the Central Juvenile and Family Court of Thailand or elsewhere.

15 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at pp 63–66 (translated).

16 Civil and Commercial Code, s 1547 (ประมวลกฎหมายแพ่งและพาณิชย์ บรรพ ๕ พ.ศ. ๒๕๑๙).

15 The plaintiff maintained that he was the father of the juvenile and an application in Sweden for recognition of legitimation of child was made in 1998 (BE 2541) and the juvenile later moved to Sweden under the joint custody of both the father and the mother.

16 Subsequently, during a proceeding before the court in Stockholm, the defendant (wife) abducted the juvenile and took her back to Thailand without informing the plaintiff (husband) and the plaintiff was not able contact the juvenile. On 14 November 2003 (BE 2546), the court in Stockholm gave judgment, by default, awarding to the plaintiff sole custody of the juvenile. Before the Central Juvenile and Family Court of Thailand, the plaintiff asked the court to make an order for the defendant to return the juvenile to the plaintiff.[17]

17 The defendant argued that the plaintiff did not make the application for recognition of legitimacy of child under Thai law. He did so only under Swedish law. So, the juvenile could not be considered as his legitimate child under Thai law.[18] Moreover, the judgment of the court in Sweden was a judgment in default of appearance. The defendant maintained that she did not have an opportunity to argue her case in full and hence that judgment could not be recognised and enforced in Thailand. In addition, she argued that Thailand has no law on the recognition and enforcement of foreign judgments.[19]

17 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at p 63 (translated).

18 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at p 63 (translated).

19 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at p 64 (translated).

18 The Central Juvenile and Family Court of Thailand made reference to sections 5,[20] 31[21] and 33[22] of the Act on Conflict of Laws. The Thai court found that the judgment of the court in Stockholm was rendered, as admitted by the defendant in this case, by a court with competent jurisdiction.[23] The defendant also admitted that the judgment of the court in Stockholm was final.[24] The law concerning the legitimacy of a child and the right of custody are for the benefit of the juvenile. Therefore, the decision of the court in Stockholm in this case was not contrary to the public policy or good morals of Thailand. Hence, the Thai court ruled that the plaintiff had the sole right of custody of the child following the judgment of the court in Stockholm and that the plaintiff in this case had the right to sue the defendant for an order returning the juvenile to his custody.[25]

19 As observed by Sriboonroj, the Central Juvenile and Family Court of Thailand adopted an approach similar to that of the Supreme Court of Thailand in Decision No 585/2461 in that the foreign judgment must:

(a) be rendered by the court with proper jurisdiction;
(b) be final and conclusive; and

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20 Section 5 of the Act on Conflict of Laws (BE 2481) [1938] states: "Whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Siam."

21 Section 31 of the Act on Conflict of Laws (BE 2481) [1938] states: "Legitimation of a child is governed by the law of nationality of the father at the time of legitimation; if at such time, the father happens to be dead, the law of nationality of the father at the time of his death shall govern."

22 Section 33 of the Act on Conflict of Laws (BE 2481) [1938] states: "Deprivation of parental power is governed by the law of the country to which the Court ordering such deprivation belongs."

23 It is not known why the defendant admitted the court had proper jurisdiction as this author was unable to locate a link to the original judgment on the website of the Central Juvenile and Family Court of Thailand or elsewhere.

24 It is not known why that concession was made by the defendant as this reporter was unable to locate a link to the original judgment on the website of the Central Juvenile and Family Court of Thailand or elsewhere.

25 Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgments in ASEAN" (a thesis submitted in partial fulfilment of the requirements for the Degree of Master of Laws International Law, Faculty of Law, Thammasat University, 2011) at pp 65–66 (translated).

(c) not be contradictory to the public policy or good morals of the forum.[26]

20 However, Sriboonroj observed further that in this case, the Central Juvenile and Family Court of Thailand only recognised the judgment of the court in Stockholm as evidence in the case. On the likely assumption that section 3 of the Act on Conflict of Laws does not confer a power to Thai courts to recognise and enforce a foreign judgment, in practice, Thai courts are limited in their ability to recognise a foreign judgment in that such a judgment can only be admissible as evidence in the case.

D CONCLUSION

21 In the absence of law on the recognition and enforcement of foreign judgment in Thailand, a litigant with a foreign judgment needs to commence proceedings *afresh* before a court in Thailand. The foreign judgment is taken as evidence which the court may take note of so long as a few criteria are fulfilled, namely: it was rendered by a foreign court of competent jurisdiction, it is final and conclusive (noting that a judgment entered in default of appearance may not be "final"), and it is not against the public policy or good morals of Thailand.

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26 From secondary sources in Thai describing Case No 585/2461, it appears the court did not consider the point on the public policy or good morals of the forum in that case.

Country Report
SOCIALIST REPUBLIC OF VIETNAM

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A INTRODUCTION

1 Vietnam follows the civil law tradition. Accordingly, codes and law texts are the main sources of law. However, the concept of a "precedent" has been recently introduced by the 2014 Law on Organisation of People's Courts[1] ("LOPC"). Pursuant to this, the Supreme Court will select and publish "precedents" for the purpose of guiding the lower courts.

2 The recognition and enforcement of foreign judgments is mainly regulated by the 2015 Civil Procedure Code[2] ("2015 CPC"). Pursuant to the 2015 CPC, Vietnam will recognise and enforce foreign judgments in three situations: (a) under international treaties; (b) on the basis of the principle of reciprocity; and (c) other judgments or decisions of foreign courts which are recognised and enforced under Vietnamese law.[3] The third one is in respect of other codes or laws which provide for recognition and enforcement of foreign judgments; however, so far, the

1 Law on Organisation of People's Court (No 62/2014/QH13) Art 22(1)(c).

2 Civil Procedure Code (No 92/2015/QH13) ("2015 CPC"). Before that, the recognition and enforcement of foreign judgments was regulated by the 1993 Ordinance on Recognition and Enforcement of Foreign Judgments, which was replaced by the Civil Procedure Code (No 24/2004/QH11), which was in turn repealed by the 2015 CPC.

There is no registration process for foreign judgments in Vietnam and accordingly a judgment creditor will have to commence a fresh action to recognise and enforce a foreign judgment. The registration process is only applied for foreign non-executable judgments or decisions on family matters.

3 Civil Procedure Code (No 92/2015/QH13) Art 423(1).

only relevant law is the 2014 Law on Marriage and Family[4] which provides for the recognition of foreign non-executable judgments or decisions on family matters by registration[5] and is therefore not relevant for the purposes of this report. Accordingly, the following focuses on the provisions of the 2015 CPC and the practice in Vietnam.

B RECOGNITION AND ENFORCEMENT UNDER TREATY

3 Vietnam has signed bilateral agreements on legal assistance, which also regulate the mutual recognition and enforcement of judgments of the courts of the two signatory countries to the bilateral agreement, with the following countries:

(a) the Socialist Republic of Czechoslovakia (signed on 12 October 1982); now both the Czech and the Slovak Republic have succeeded this agreement;[6]
(b) Cuba (signed on 30 November 1984);[7]
(c) Hungary (signed on 18 January 1985);[8]
(d) Bulgaria (signed on 3 October 1986);[9]
(e) Poland (signed on 23 March 1993);[10]
(f) Russia (signed on 25 August 1998);[11]

4 No 52/2014/QH13.
5 Law on Marriage and Family (No 52/2014/QH13) Art 125.
6 Agreement on Mutual Assistance and Jurisdiction on Civil and Criminal Matters between the Socialist Republic of Vietnam and the Socialist Republic of Czech and Slovakia.
7 Agreement on Mutual Assistance on Civil, Family, Labour and Criminal Matters between the Socialist Republic of Vietnam and the Republic of Cuba.
8 Agreement on Mutual Assistance on Civil, Family and Criminal Matters between the Socialist Republic of Vietnam and the People Republic of Hungary.
9 Agreement on Mutual Assistance on Civil, Family and Criminal Matters between the Socialist Republic of Vietnam and the People Republic of Bulgaria.
10 Agreement on Mutual Assistance on Civil, Family and Criminal Matters between the Socialist Republic of Vietnam and the Republic of Poland.
11 Agreement on Mutual Assistance and Jurisdiction on Civil and Criminal Matters between the Socialist Republic of Vietnam and the Federation of Russia.

(g) Laos (signed on 6 July 1998);[12]
(h) China (signed on 19 October 1998);[13]
(i) France (signed on 24 February 1999);[14]
(j) Ukraine (signed on 6 April 2000);[15]
(k) Mongolia (signed on 17 April 2000);[16]
(l) Belarus (signed on 14 September 2000);[17]
(m) Algeria (signed on 14 April 2010);[18]
(n) Kazakhstan (signed on 31 October 2011);[19] and
(o) Cambodia (signed on 21 January 2013).[20]

In addition, Vietnam is in the process of negotiating a bilateral agreement on legal assistance with India.[21]

12 Bilateral Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the Lao People's Democratic Republic (signed on 6 July 1998, ratified by Vietnam on 3 June 1999) ("Lao Bilateral Agreement").

13 Bilateral Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the People's Republic of China (signed on 19 October 1998, ratified by Vietnam on 30 June 1999) ("Chinese Bilateral Agreement").

14 Agreement on Mutual Assistance on Civil Matters between the Socialist Republic of Vietnam and the Republic of France.

15 Agreement on Mutual Assistance on Civil and Criminal Matters between the Socialist Republic of Vietnam and Ukraine.

16 Agreement on Mutual Assistance on Civil, Family and Criminal Matters between the Socialist Republic of Vietnam and Mongolia.

17 Agreement on Mutual Assistance on Civil, Family, Labour and Criminal Matters between the Socialist Republic of Vietnam and the Republic of Belarus.

18 Agreement on Mutual Assistance on Civil and Commerce Matters between the Socialist Republic of Vietnam and the People's Democratic Republic of Algeria.

19 Bilateral Agreement on Legal Assistance in Civil Matters between the Socialist Republic of Vietnam and the Republic of Kazakhstan.

20 Agreement on Legal Assistance in Civil Matters between the Socialist Republic of Vietnam and the Kingdom of Cambodia (signed on 21 January 2013, entered into force on 9 October 2014) ("Cambodian Bilateral Agreement").

21 See Decision No 2258/QĐ-CTN (dated on 11 September 2014) of the State President on the negotiation of a bilateral agreement on legal assistance in civil matters between Vietnam and India. The draft bilateral agreement is not available and this reporter has no information on when the bilateral agreement will be entered into.

4 The conditions for the recognition and enforcement of judgments from the countries with which Vietnam has entered into a treaty will be as set out in such treaties.[22] These conditions differ from treaty to treaty. In view of the fact that this report focuses only on the foreign judgments rendered by the courts in the ASEAN countries and from five additional countries, namely, Australia, China, India, Japan and South Korea, this section will examine the recognition and enforcement of judgments issued by the courts of Cambodia, China and Laos.

i *The bilateral agreement with Cambodia*

5 The Agreement on Legal Assistance in Civil Matters between the Socialist Republic of Vietnam and the Kingdom of Cambodia[23] ("Cambodian Bilateral Agreement") covers both non-executable judgments in the field of marriage and family law, which only require recognition and do not relate to assets or resort to any executable matters, and executable judgments, which require recognition and enforcement. Executable judgments include: judgments *in personam* and *in rem*, as well as monetary and non-monetary judgments.[24]

6 There are special procedures for the recognition and enforcement of executable judgments.[25] An executable Cambodian judgment in civil and commercial matters from any court in Cambodia will be recognised and enforced in Vietnam if it meets the following conditions:[26]

(a) the case does not fall under the exclusive jurisdiction of the Vietnamese courts under the law of Vietnam;

22 Civil Procedure Code (No 92/2015/QH13) Art 439(1).

23 Signed on 21 January 2013; entered into force 9 October 2014.

24 Cambodian Bilateral Agreement, Arts 20 and 21.

25 In general, the recognition of a non-executable judgment on marriage or family law under the Cambodian Bilateral Agreement does not require any special procedures. However, a party who opposes the recognition of the judgment may request for the procedure for non-recognition if the judgment falls within one of the grounds for non-recognition set out in Art 20 of the Cambodian Bilateral Agreement.

26 Cambodian Bilateral Agreement, Art 22. As far as this reporter is aware, there have not been any cases in respect of the interpretation of these conditions.

(b) the parties were summoned or declared absent lawfully according to the law of Cambodia;
(c) the judgment has taken legal effect and is still enforceable according to the law of Cambodia;
(d) there has not been a legally effective judgment in the same dispute by a Vietnamese court or another foreign court whose judgment has been recognised in Vietnam, or the case has not been accepted or is being adjudicated by a Vietnamese court; and
(e) the recognition and enforcement of the judgment and the consequences of such recognition and enforcement are not contrary to fundamental principles of Vietnamese law and public policy. The term "fundamental principles" is the term mainly used in Vietnam's codes and laws, whilst "public policy" is the term that more often occurs in international treaties. They have similar meaning under Vietnam law.

ii *The bilateral agreement with China*

7 The Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the People's Republic of China[27] ("Chinese Bilateral Agreement") provides that a Chinese judgment (both executable judgments and non-executable judgments) in civil and commercial matters from any court in China must not be recognised and enforced in Vietnam if one of the following situations applies:[28]

(a) the judgment has not taken legal effect or is not enforceable according to Chinese law;
(b) the Chinese court which made the judgment does not have jurisdiction according to Article 17 of the Chinese Bilateral Agreement;
(c) in respect of a default judgment, the judgment debtor had not been summoned lawfully or the party who lacked civil capacity did not have a lawful representative according to Chinese law; or

27 Signed on 19 October 1998, ratified by Vietnam on 30 June 1999.
28 Chinese Bilateral Agreement, Art 17. As far as this reporter is aware, there have not been any cases in respect of the interpretation of these conditions.

(d) there has been a legally effective judgment in the same dispute by a Vietnamese court or another foreign court whose judgment has been recognised in Vietnam, or the case had been accepted by a Vietnamese court.

iii *The bilateral agreement with Lao*

8 The Agreement on Legal Assistance in Civil and Criminal Matters between the Socialist Republic of Vietnam and the Lao People's Democratic Republic[29] ("Lao Bilateral Agreement") sets out the following conditions[30] for the recognition and enforcement of a Lao judgment (both executable judgments and non-executable judgments) in civil and commercial matters from any court in Lao:[31]

(a) the judgment has taken legal effect and is enforceable according to Lao law;
(b) the judgment was issued by a Lao court which had jurisdiction according to the Lao Bilateral Agreement or according to Vietnamese law;
(c) the judgment is not contrary to the law of Vietnam, or Vietnam has not recognised and enforced a judgment in the same dispute from another foreign country, or the Vietnamese courts have not accepted or adjudicated the case;
(d) the parties and their lawful representatives have participated in the procedures and their procedural rights were assured; and
(e) the recognition and enforcement of the Lao judgment will not infringe the sovereignty and national security of Vietnam or is not contrary to the fundamental principles of Vietnamese law.

29 Signed on 6 July 1998, ratified by Vietnam on 3 June 1999.
30 As far as this reporter is aware, there have not been any cases in respect of the interpretation of these conditions.
31 Lao Bilateral Agreement, Art 45.

C RECOGNITION AND ENFORCEMENT OF A FOREIGN JUDGMENT OTHER THAN UNDER TREATY

i *Reciprocity*

9 Apart from judgments under the treaties listed above, Vietnam will also recognise and enforce judgments in civil and commercial matters from other countries on the basis of reciprocity.[32] As stated clearly by Article 423(1)(b) of the 2015 CPC, a non-treaty judgment can be recognised and enforced based on the principle of reciprocity. However, how this principle applies in Vietnam is not clear.

10 The 2007 Law on Legal Assistance[33] states that the Ministry of Foreign Affairs is in charge of and must co-ordinate with the other relevant state organs to decide on the application of the principle of reciprocity in legal assistance in relation to other countries. Every six months and annually, the Ministry of Foreign Affairs is required to inform the Ministry of Justice on the application of the principle of reciprocity in legal assistance in relation to other countries.[34] However, so far, this has not been done.

11 An example of when the Vietnamese courts have applied the principle of reciprocity is the case of *Choongnam Spinning v E & T Company*[35] ("*Choongnam Spinning*").

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32 Article 423(1)(b) of the Civil Procedure Code (No 92/2015/QH13) which replaced Art 343(1) of the Civil Procedure Code (No 24/2004/QH11).

33 No 08/2007/QH12 (approved on 21 November 2007; entered into force on 1 July 2008).

34 Law on Legal Assistance (No 08/2007/QH12) Art 66.

35 Decision No 2083/2007/QĐST-KDTM (People's Court of Ho Chi Minh City), decision No 62/2008/QDKDTM-PT (Court of Appeal of the Supreme People's Court in Ho Chi Minh City). It should be noted that the principle of reciprocity was first included as a requirement in the Civil Procedure Code (No 24/2004/QH11). As far as this reporter is aware, except for *Choongnam Spinning v E&T Company* decision No 62/2008/QDKDTM-PT, there have not been any other cases in which the principle of reciprocity has been applied. Before the Civil Procedure Code (No 24/2004/QH11), the law of Vietnam only recognised and enforced a foreign judgment under a treaty. There were some applications for recognition and enforcement of non-treaty judgments, but they all failed. For example, in 1998, there was an application for recognition and

(*continued on the next page*)

12 In *Choongnam Spinning*, Choongnam Spinning Ltd (a South Korean entity) and Viet Thang Textile Company (a Vietnamese entity) created a joint venture company named Choongnam Viet Thang Ltd (a Vietnamese entity) in the year 1992. In March 1998, Choongnam Spinning transferred 35% of its shares in Choongnam Viet Thang to Yonho (a South Korean entity) and Yonho later transferred the shares to E & T (a South Korean entity). By 2002, Choongnam Spinning was in a bankruptcy procedure in South Korea. The Dae Cheon Appeal Court of South Korea made a judgment on the case[36] which stated that the transfer of the shares from Choongnam Spinning to Yoho and from Yoho to E & T was to disperse its assets and, therefore, the transfers were null and void and that E & T had to transfer the shares and interests back to Choongnam Spinning.

13 Choongnam Spinning requested that the Ho Chi Minh City First Instance Court recognise and enforce the judgment of the Dae Cheon Appeal Court. The Ho Chi Minh City First Instance Court held that:[37]

> Dae Cheon Appeal Court's judgment on case No 2004 Na 10655 has taken legal effect according to South Korean law, and it does not fall under Article 356 (listed the situations that a foreign judgment cannot be recognised and enforced in Vietnam), Article 411 (listed exclusive jurisdictions of Vietnamese courts). Therefore, it accepts the request of Choongnam Spinning to recognise and enforce the Korean judgment. [translation by reporter]

14 The Appeal Court of the Supreme Court in Ho Chi Minh City, rejected E & T's appeal and recognised and enforced the judgment of the Dae Cheon Appeal Court with the same rationales as the first instance court's decision.[38]

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enforcement of a judgment of the High Court of Singapore dated 16 January 1998 in litigation No 600/1998; in 2001, there was an application for recognition and enforcement of a Taiwanese judgment No 630/2001 (28 September 2001).

36 No 2004 Na 10655.

37 Decision No 2083/2007/QĐST-KDTM. Articles 439 and 470 of the Civil Procedure Code (No 92/2015/QH13) replaced Arts 356 and 411 of the Civil Procedure Code (No 24/2004/QH11).

38 Decision No 62/2008/QĐKDTM-PT.

15 Vietnam and South Korea have not signed any treaty in respect of the recognition and enforcement of the judgments of the two countries. Therefore, it is this reporter's view that the Vietnamese courts applied the principle of reciprocity in order to recognise and enforce the Korean judgment, although this was not stated clearly in the decisions.

16 From *Choongnam Spinning*, it appears that the Vietnamese courts would apply the principle of reciprocity in a broad manner. The case suggests that, provided a foreign judgment has taken legal effect, does not fall within the situations which cannot be recognised and enforced in Vietnam and does not belong within Vietnam's exclusive jurisdiction, it will be recognised and enforced in Vietnam. However, since the practice of recognition and enforcement of foreign judgments in civil and commercial matters is limited,[39] it is not yet clear whether *Choongnam Spinning* will become a precedent or not.

17 It should be noted that *Choongnam Spinning* was decided in 2008 when the 2004 Civil Procedure Code[40] ("2004 CPC") was still in effect. Both the first instance court and the appeal court based their decisions on Article 356 of the 2004 CPC, which set out the situations when a non-treaty foreign judgment must not be recognised and enforced in Vietnam. These conditions differ slightly from Article 439 of the 2015 CPC. However, the differences are not material and the author still considers it remains the case that provided a foreign judgment has taken legal effect, does not fall within the situations which cannot be recognised and enforced in Vietnam and does not belong within Vietnam's exclusive jurisdiction, it will be recognised and enforced in Vietnam.

39 In contrast, many non-executable foreign judgments and decisions in marriage and family matters have been registered (recognised) in Vietnam.

40 Civil Procedure Code (No 24/2004/QH11).

ii Types of judgments that can be recognised and enforced in Vietnam

a *In personam* judgments

18 Vietnam recognises and enforces foreign civil judgments including in civil, marriage, family, trade, business and labour matters, and decisions on properties in foreign criminal and administrative judgments or decisions.[41] Decisions on properties in criminal and administrative judgments or decisions of foreign courts refers to the part of the decision in respect of property (money) payable to private parties. Accordingly, damages awarded pursuant to foreign penal, revenue or other public laws which are payable to public organs are, therefore, eliminated from recognition and enforcement. The law does not set up any restriction in relation to the recognition and enforcement of the monetary part of the criminal and administrative judgments or decisions.

19 Similar to under the bilateral agreements, the 2015 CPC classifies foreign judgments into non-executable judgments (which only require recognition and do not relate to assets or resort to any executable methods) and executable judgments (which require recognition and enforcement).[42] Executable judgments may, in the view of this reporter,[43] include judgments *in personam* and *in rem* as well as monetary and non-monetary judgments. The interest on the sum can be recognised and enforced if it is stated in the foreign judgment or decision.[44]

41 Civil Procedure Code (No 92/2015/QH13) Art 423.

42 The Civil Procedure Code (No 92/2015/QH13) provides separate procedures for the recognition and enforcement of foreign executable judgments and decisions (Chapter XXXVI, Section 1), procedures for the non-recognition of foreign executable judgments (Chapter XXXVI, Section 2); and procedures for the non-recognition of non-executable judgments and decisions (Chapter XXXVI, Section 3).

43 Vietnamese law does not include the terms judgment *in rem* or judgment *in personam*.

44 Article 438(4) of the Civil Procedure Code (No 92/2015/QH13) provides that the judges when considering the request for recognition/enforcement of a foreign judgment will not review the merits of the case. Therefore, as long as the interest of the sum is stated in the foreign judgments/decisions, it can be recognised and enforced in Vietnam. See also *Choongnam Spinning v E & T Company* decision

(*continued on the next page*)

20 Vietnam allows for the enforcement of non-money judgments including declaratory orders and orders of specific performance as seen in *Choongnam Spinning*. A permanent injunction can be enforced in Vietnam if it has taken effect and is final. However, it is not clear if a preliminary injunction, such as a foreign asset-freezing order, which has taken legal effect under the law of the foreign courts but is not final can be recognised and enforced in Vietnam since it is not stated clearly in either the bilateral treaties or the 2015 CPC.

b *In rem* judgments

21 Vietnam allows for the recognition and enforcement of foreign judgments against property.[45] If the foreign judgment involves immovable property located in Vietnam, it cannot be recognised and enforced in Vietnam as, in such a case, the foreign court will not have jurisdiction under Article 440 of the 2015 CPC, since the case falls within the exclusive jurisdiction of the courts of Vietnam according to Article 470(1)(a) of the 2015 CPC.

22 The grounds on which a foreign judgment against property will be refused recognition and enforcement are identical to the grounds which apply to foreign judgments *in personam*.[46]

iii *Situations where a foreign judgment other than under treaty must be refused recognition and enforcement by the courts of Vietnam*

23 Article 439 of the 2015 CPC provides for the situations where a foreign judgment other than under treaty must be refused recognition and enforcement by the courts of Vietnam.

No 2083/2007/QĐST-KDTM (People's Court, Ho Chi Minh City), decision No 62/2008/QDKDTM-PT (Supreme People's Court).

45 Civil Procedure Code (No 92/2015/QH13) Art 423.

46 Civil Procedure Code (No 92/2015/QH13) Arts 439 and 449(2).

a Finality of the foreign proceedings

24 The courts of Vietnam must not recognise and enforce a foreign judgment if it has not taken legal effect under the laws of the home country of the foreign court.[47]

25 As long as the foreign judgment has taken legal effect according to the laws of the foreign country, the foreign judgment can be recognised and enforced in Vietnam. Therefore, whether the courts in Vietnam would refuse to recognise and enforce a foreign judgment because it can be appealed to a higher court in the foreign court system will depend on the law of the foreign court relating to the legal effect of its own judgments. For example, a judgment of a first instance court in common law countries which has taken legal effect in that country can be recognised and enforced in Vietnam, although it can be appealed to a higher court. It is certain that a final judgment, including a default judgment,[48] which has taken legal effect can be recognised and enforced in Vietnam, but the position in relation to an interlocutory judgment is not clear since neither the bilateral treaties nor the 2015 CPC have any provision on the recognition and enforcement of interlocutory judgments or provisional emergency measures.

b Due process

26 The courts of Vietnam must refuse to recognise and enforce foreign judgments if the judgment debtors or their lawful representatives are absent from the court sessions of the foreign court because they have not been lawfully summoned or the documents of the foreign court have not been delivered to them in a reasonable time period as prescribed in the law of the country of such foreign court and therefore such persons were unable to exercise the right to self-defence.[49]

47 Civil Procedure Code (No 92/2015/QH13) Art 439(2).

48 This is not stated in the law as such but, in Vietnam, it cannot be doubted that a default judgment, which has taken legal effect, will also be enforceable.

49 Civil Procedure Code (No 92/2015/QH13) Art 439(3).

c Jurisdiction of foreign court

27 The courts of Vietnam must refuse to recognise and enforce a foreign judgment if the foreign court did not have jurisdiction to hear the case.[50] Whether the foreign court has jurisdiction is considered according to the laws of Vietnam, particularly Article 440 of the 2015 CPC.[51]

28 Article 440 of the 2015 CPC provides that any foreign court issuing a judgment or decision that is being considered for recognition and enforcement in Vietnam shall have jurisdiction to settle the civil case in the following instances:

(a) The civil case does not fall within the exclusive jurisdiction of Vietnamese courts as specified in Article 470 of the 2015 CPC.
(b) The civil case falls into a case specified in Article 469 of the 2015 CPC but one of the following conditions applies:
    (i) the defendant participated in oral argument without appeal against the jurisdiction of such foreign court;
    (ii) no judgment or decision issued by a third country for such civil case has been recognised and enforced by the Vietnamese court; or
    (iii) such civil case has been accepted by a foreign court before being accepted by a Vietnamese court.

29 In the commercial context, Articles 470(1)(a) and 470(1)(c) of the 2015 CPC provide that the courts of Vietnam have exclusive jurisdiction over civil lawsuits involving foreign elements in the following instances:

(a) civil lawsuits involving rights to immovable properties in the Vietnamese territory; and
(b) other civil lawsuits where the parties are allowed to choose the Vietnamese courts as the forum for dispute resolution according

50 Civil Procedure Code (No 92/2015/QH13) Art 439(4).
51 Civil Procedure Code (No 92/2015/QH13) Art 439(4).

to Vietnamese law or treaties[52] to which the Socialist Republic of Vietnam is a signatory and the parties agreed to choose the Vietnamese courts.

30 Article 469(1) of the 2015 CPC provides the grounds for jurisdiction of the courts of Vietnam to resolve civil cases involving foreign elements. The grounds which may be relevant for commercial cases are:

(a) the defendant is an individual who resides, works or lives for a long term in Vietnam;
(b) the defendant is an agency or organisation which is headquartered in Vietnam, or the defendant is an agency or organisation which has a branch or a representative office in Vietnam where the case relates to the operation of the branch or representative office in Vietnam of such agency or organisation;
(c) the defendant has properties in Vietnam;
(d) divorce cases with the plaintiffs or the defendants being Vietnamese citizens or that involved parties being foreigners who reside, work or live for a long term in Vietnam;
(e) civil cases related to civil relations which are established, changed or terminated in Vietnam, the subject matter of which are properties in Vietnam or acts performed in Vietnam;
(f) civil cases related to civil relations which are established, changed or terminated outside Vietnam but involve rights and obligations of Vietnamese agencies, organisations and individuals, or agencies, organizations and individuals that are headquartered or reside in Vietnam.

52 "Treaties" means an agreement, in written form, concluded in the name of the State or in the name of the Government of the Socialist Republic of Vietnam with a foreign contracting party, that gives rise to, changes or terminates the rights and obligations of the Socialist Republic of Vietnam under international law, regardless of its title, such as treaty, convention, pact, covenant, agreement, protocol, memorandum of understanding, note or another title: Law on Treaties (No 8/2016/QH 13) Art 2(1). In the context of jurisdiction, this term applies to bilateral agreements on legal assistance.

d Breach of agreement

31 A civil lawsuit where parties are allowed to choose the Vietnamese courts as the forum for dispute resolution according to Vietnamese law or international treaties to which the Socialist Republic of Vietnam is a signatory and parties agreed to choose Vietnamese courts will belong to the exclusive jurisdiction of the court(s) of Vietnam.[53]

32 According to Article 440 of the 2015 CPC, the foreign court will not have jurisdiction in such a case, and therefore, any resulting foreign judgment (which was issued in breach of the agreement on choice of Vietnamese courts) will not be recognised and enforced in Vietnam.[54] The law does not make it clear whether a clause which confers non-exclusive jurisdiction, as opposed to exclusive jurisdiction, to the Vietnamese courts, will be considered to fall within the exclusive jurisdiction of the courts of Vietnam. However, from this reporter's point of view, if the choice of court clause makes only a choice of the Vietnamese court(s), and does not mention the possibility of seizing other countries' courts (regardless of whether the clause uses the term "exclusive" or not), it will be considered as conferring exclusive jurisdiction to the Vietnamese courts.

33 The situation is not clear in the case of a choice of court agreement for the courts of a third country. Articles 440, 469 and 470 of the 2015 CPC, which determine the jurisdiction of the foreign court, do not provide grounds for the courts of Vietnam to refuse recognition and enforcement of a foreign judgment which was rendered in breach of a choice of court agreement for a third country.

53 Civil Procedure Code (No 92/2015/QH13) Art 470(1)(c).

54 Civil Procedure Code (No 92/2015/QH13) Art 349(4).

34 The Hague Convention of 30 June 2005 on Choice of Court Agreements has been discussed by scholars[55] in Vietnam who have expressed their support for signing this convention. However, there is no sign from the Government of Vietnam that it is ready to do this yet.

e *Res judicata*

35 The courts of Vietnam must refuse to recognise and enforce a foreign judgment if the case has been settled by a legally effective civil judgment or decision of a court of Vietnam, or before the foreign court accepted the case, it has been accepted and is being heard by a court in Vietnam.[56]

36 According to the 2015 CPC, the courts of Vietnam must refuse to recognise and enforce a foreign judgment if it conflicts with a third country's judgment which has been recognised and enforced in Vietnam.[57] The law does not anticipate the situation where the court of Vietnam is faced with two conflicting foreign judgments each of which is entitled to recognition and enforcement in its own right. It is considered by this reporter that the foreign judgment in respect of which recognition and enforcement is first applied for will have priority.

f Enforceability

37 A foreign judgment cannot be recognised and enforced in Vietnam if the time limit for enforcement of that judgment prescribed in the law

55 See Ngoc Bich Du, "Changing the Approach on Regulation of Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters" (2008) 23 *Journal of the Supreme Court* 2 and Manh Dung Nguyen, "Enforcement of Foreign Judgments and Arbitral Awards" at http://dzungsrt.com/wp-content/uploads/2015/03/03142016tham-luan-ACJM-2Final-1.pdf (accessed 10 August 2017).

56 Civil Procedure Code (No 92/2015/QH13) Art 439(5).

57 Civil Procedure Code (No 92/2015/QH13) Art 439(5).

of the home country of the foreign court or in Vietnam's law on civil judgment enforcement has been exceeded.[58]

g Cancellation and termination

38 A foreign judgment cannot be recognised and enforced in Vietnam if the enforcement of the judgment has been cancelled or terminated in the home country of the court issuing such judgment.[59]

h Public policy

39 The courts of Vietnam must refuse to recognise and enforce a foreign judgment if "the recognition and enforcement of civil judgments/decisions of the foreign court in Vietnam are contrary to basic principles of the law of Vietnam".[60] Under Vietnamese law, the basis of the principles of law can be found in the 2013 Constitution of the Socialist Republic of Vietnam,[61] the 2015 Civil Codes,[62] the 2005 Commercial Law[63] and other codes and laws.

40 There has not been any official guidance or practices on how to apply this condition in respect of foreign judgments. However, there are some decisions where the Vietnamese courts have rejected the recognition and enforcement of foreign arbitration awards due to an

58 Civil Procedure Code (No 92/2015/QH13) Art 439(6). See the 2008 Law on Enforcement of Civil Judgments (No 26/2008/QH12) ("LECJ") and the 2014 Law amending and supplementing a number of articles of the Law on Enforcement of Civil Judgments (No 64/2014/QH13) ("Amending Law"). According to Art 30 of the 2008 LECJ and the 2014 Amending Law, the time limit for enforcement of judgments is five years from the date the judgment has taken legal effect.

59 Civil Procedure Code (No 92/2015/QH13) Art 439(7).

60 Civil Procedure Code (No 92/2015/QH13) Art 439(8).

61 See the Constitution of the Socialist Republic of Vietnam (approved 28 November 2013; entered into force on 1 January 2014).

62 No 91/2015/QH13.

63 No 36/2005/QH11.

equivalent condition, for example, *Tyco service v Leighton Contractors*,[64] *Energo-novus, Moscow v Vinatex*,[65] *Kyunggi Silk Co Ltd v Viseri*,[66] *Kurihara Kogyo Ltd v Cong ty lien doanh THHH Ha Noi*.[67] In these cases, the courts of Vietnam often reviewed the merits of the cases and, if the laws applied in the cases differed from the laws of Vietnam, the courts would refuse to recognise and enforce the foreign arbitration awards because of "the recognition and enforcement of the foreign arbitration's awards in Vietnam are contrary to basic principles of law of Vietnam".[68] However, the practice of reviewing the merits of foreign arbitration awards has been recently restricted[69] and more foreign arbitration awards have been recognised and enforced in Vietnam. Furthermore, in *Choongnam Spinning*, the courts of Vietnam did not review the merits of the case and did not raise the issue of whether the law of South Korea was contrary to basic principles of the law of Vietnam.

iv *No review of merits of the case*

41 In deciding whether to recognise and enforce a foreign judgment, the courts of Vietnam must not examine the substantive merits of the foreign court's judgment. The courts are only entitled to check and compare the civil judgment or decision of the foreign court and the

64 Judgment No 82/QD-XDTT (23 May 2002) (First Instance Court, Ho Chi Minh City) and Judgment No 02/PTDS (21 January 2003) (Appellate Court, Ho Chi Minh City).

65 Judgment No 02/ST (18 November 1997) (First Instance Court, Hanoi City) and Judgment No 59/KTPT (4 June 1998) (Appellate Court, Hanoi City).

66 Judgment No 01/YCCN (23 July 2001) (First Instance Court, Lam Dong province).

67 Judgment No 01/QD (21 September 2001) (First Instance Court, Hanoi City).

68 Judgment No 82/QD-XDTT (23 May 2002) (First Instance Court, Ho Chi Minh City) and Judgment No 02/PTDS (21 January 2003) (Appellate Court, Ho Chi Minh City) in *Tyco Service v Leighton Contractors* Judgment No 02/ST (18 November 1997) (First Instance Court, Hanoi City) and Judgment No 59/KTPT (4 June 1998) (Appellate Court, Hanoi City) in *Energo-novus, Moscow v Vinatex*.

69 See the Official Dispatch of the Supreme Court No 246/TANDTC-KT (dated 25 June 2014) in which the Supreme Court, among other things, emphasises that in the procedures of recognition and enforcement of foreign arbitral awards, the courts must not review the merit of the cases.

accompanying papers and documents against the provisions of the 2015 CPC and other relevant provisions of Vietnamese law in order to form the basis for the issuance of the decision to recognise and enforce such judgment or decision.[70]

42 Therefore, it follows that the courts of Vietnam cannot refuse to recognise and enforce a foreign judgment because the foreign court made an error of fact or an error of law or both, and nor will the courts of Vietnam consider an allegation of fraud (in whatever form) whether it was raised before the foreign court or not.

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70 Civil Procedure Code (No 92/2015/QH13) Art 438(4).

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